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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 698

DANIEL F. BOONE, PETITIONER,

vs.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1943.

CERTIORARI GRANTED MARCH 8, 1943.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 1]

SUPREME COURT OF NORTH CAROLINA, EIGHTEENTH DISTRICT, FALL TERM, 1942

No. 164

From Henderson

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, Mrs. Martha Lightner Boone and Martha Penelope Boone, A Minor, Represented in This Proceeding by Her Next Friend, W. C. Hague, Plaintiffs,

v.

DANIEL F. BOONE, Trustee for Martha Penelope Boone, A Minor

Before Sink, J., May-June 1942 Term of Henderson Superior Court—Defendant Appealed

STIPULATION

It is stipulated by and between the plaintiffs and the defendant that Clarence M. Lightner, Theodore A. Lightner, Mrs. Alice Lightner Hopf, Mrs. Martha Lightner Boone and Martha Penelope Boone, a minor, represented in this proceeding by her next friend, W. C. Hague, are the plaintiffs, and that Daniel F. Boone, Trustee, is the defendant in said action, and that the said parties mentioned are the only parties in said action; that the said Martha Penelope Boone, Minor, is represented in the proceeding by her next friend, W. C. Hague, who was duly appointed next friend; that the said action was duly instituted in the Superior Court of Polk County by summons duly issued by the Clerk of the [fol. 2] Superior Court of Polk County and said summons was duly served on the defendant, Daniel F. Boone, Trustee, on the 23rd day of June 1941; that it shall be unnecessary to include the summons as a part of the record; that the action was heard before His Honor, H. Hoyle Sink, Judge presiding at the regular May-June 1942 Term for the trial of civil cases in Henderson County, and that the Court was properly organized.

It is further stipulated and agreed that the record of the case on appeal to the Supreme Court shall consist of this

stipulation, the complaint and exhibits thereto, the answer, the reply, the order made at the January-February Term 1942, of the Superior Court of Polk County transferring the case to Henderson County for trial; the order made at the May-June Term 1942 of the Superior Court of Henderson County denying the motion of the defendant for a continuance; the verdict of the jury, the judgment and the entries of appeal; the case on appeal as settled by the trial Judge; defendant's assignments of error, and the Clerk's certificate.

It is further agreed that the order transferring the case from the Superior Court of Polk County to the Superior Court of Henderson County for trial, and the order denying defendant's motion for a continuance, both of which are made a part of the case on appeal, are correctly transcribed in said case on appeal and need not be set out as a part of the record proper.

It is further agreed that it shall not be necessary to print the captions and verifications of the pleadings.

This 1st day of August, A. D. 1942.

M. R. McCown, J. E. Shipman, Attorneys for Plaintiffs. Williams & Cocke, Attorneys for Defendant.

[fol. 3] IN SUPERIOR COURT OF POLK COUNTY

COMPLAINT

The above named plaintiffs, complaining of the above named defendant, allege:

1. That the plaintiff, Clarence M. Lightner, is a resident of the State of New Mexico; the plaintiff, Theodore A. Lightner and Mrs. Alice L. Hopf, are residents of the State of New York, the plaintiff, Mrs. Martha Lightner Boone, is a resident of the County of Polk and State of North Carolina, and that the plaintiff, Martha Penelope Boone, who is a minor, less than three years of age, is a resident of Forsyth County, and State of North Carolina, and is represented in this action by her next friend, W. C. Hague, who is a resident of Polk County, North Carolina.

2. That the defendant, Daniel F. Boone, is a resident of the County of Forsyth, and State of North Carolina, but is now temporarily absent therefrom, is in the military service

of the United States, and spends the larger part of his time in Washington, D. C.

3. That the above named plaintiffs, other than Martha Penelope Boone, are children of C. A. Lightner and Frances M. Lightner, deceased, each of whom, at the time of their death, were residents of the County of Polk and State of North Carolina. That both of their said parents died testate, and their respective wills are each probated and of record in the said County of Polk and State of North Carolina. That the plaintiff, Martha Penelope Boone, is a grand-daughter of the said parents of the other plaintiffs, and is a daughter of the marriage of the plaintiff, Martha Lightner Boone, and of the defendant, Daniel F. Boone.

4. That Frances M. Lightner, the mother of the said adult plaintiffs, by her last will and testament, created a trust fund for the education of all of her grand-children born prior to her death, in the sum of $40,000.00, the terms [fol. 4] and provisions of said trust being fully set forth therein, and which are herein specifically referred to and asked to be taken as a part hereof, a copy of said will being hereto annexed, and marked Exhibit A.

5. That the said Frances M. Lightner left surviving her the following grand-children, viz: Theodore Lightner, III, son of the plaintiff, Theodore A. Lightner; Claudia Lightner, daughter of the plaintiff, Clarence M. Lightner; and Daniel L. Boone, son of the plaintiff, Martha Lightner Boone, and of the defendant, Daniel F. Boone.

6. That the said Frances M. Lightner named the defendant, Daniel F. Boone as Trustee in said will, and also as Executor therein. That said defendant duly accepted said trusteeship, and duly qualified as executor, and in the course of the administration of said estate, brought a suit in the Superior Court of Polk County for the purpose of having said will construed, which was heard at the January Term 1940, of the Superior Court of Polk County, and judgment was therein rendered construing said will, and which said judgment is herein referred to and is asked to be taken as a part hereof, a copy of same being hereto annexed and marked Exhibit B.

7. That subsequent to the death of the said Frances M. Lightner and prior to the death of the said Clarence A.

Lightner, the plaintiff, Martha Penelope Boone, as hereinbefore alleged, was born of the marriage of the said Martha Lightner Boone, and the said Daniel F. Boone.

8. That the said Clarence A. Lightner, knowing that the other three grand-children above named had been provided for in the will of the said Frances M. Lightner, as hereinbefore alleged, and feeling that the said Martha Penelope Boone should have like provision made for her education as has been made for the other three children by the said [fol. 5] Frances M. Lightner, assigned and transferred two of his life insurance policies aggregating $15,300.00 to the plaintiff, Martha Lightner Boone, with the distinct understanding and agreement between him, the plaintiff Martha Lightner Boone, and the defendant Daniel F. Boone, that the proceeds of said insurance, when collected, should constitute a trust fund for the education of the said Martha Penelope Boone, on the same terms and provisions as set forth in the will of the said Frances M. Lightner for the management and control of the trust fund provided for the other three grand-children.

9. That after the death of the said Clarence A. Lightner, the said life insurance policies above referred to, were paid to the plaintiff, Martha Lightner Boone, by checks issued by the companies that issued said policies, and upon the receipt of said checks, and at the request of the defendant, Daniel F. Boone, the said Martha Lightner Boone, endorsed and delivered said checks to said defendant, who cashed the same, and received said funds as trustee for the said Martha Penelope Boone under the terms and provisions set forth in the will of the said Frances M. Lightner; that is to say, the terms and provisions set forth in the will of the said Frances M. Lightner were to control and govern the investment and management of the said fund to the same extent and in the same manner as if the said Martha Penelope Boone had been born prior to the death of the said Frances M. Lightner.

10. That under the term of said agreement the funds belonging to said trust were to be held by the said defendant, Daniel F. Boone, as Trustee, in the same manner as are the funds held by him as Trustee for the three grandchildren coming within the trust created by the said Frances M. Lightner in her said last will and testament, and the

Advisory Committee therein created, to-wit: Dr. Arthur McGraw, and the plaintiff, Theodore A. Lightner, were and are to have the same authority with respect to the control [fol. 6] and management of said fund as was conferred upon them by the will of the said Frances M. Lightner, as construed by the judgment of the court above referred to.

11. That said Advisory Committee has not been consulted by the said Daniel F. Boone in any way whatsoever with respect to the trust fund created for the benefit of the said Martha Penelope Boone by the agreement herein alleged, and neither member of said Committee has any information or knowledge as to how said fund has been invested, managed and controlled by the said Daniel F. Boone, all of which conduct on the part of the said Daniel F. Boone is in direct violation of the terms of said agreement.

12. That the said defendant, Daniel F. Boone, has not only failed and neglected to consult the two members of said Advisory Committee hereinbefore mentioned with respect to the investment and management of said fund, but has never made any report to the Clerk of the Superior Court of Polk County with respect thereto as he is in law required to do, and has refused to disclose to the plaintiffs the character and nature of the securities in which said fund is invested, and the amount of interest or dividends he has received therefrom.

13. That as the plaintiffs are advised, informed and believe, said defendant is not only failing and refusing to invest and manage said fund as required by the will of the said Frances M. Lightner, but, as the plaintiffs are advised, informed and believe, said defendant is not handling and investing said funds in a safe and proper manner as his duty as trustee would require, even if he was not required to handle them as provided by the will of the said Frances M. Lightner.

14. That because of the failure and refusal of the defendant to invest and manage said fund, as provided in the will of the said Frances M. Lightner, and because of his failure [fol. 7] and refusal to disclose to these plaintiffs the nature and character of his investment of said fund, the plaintiffs are apprehensive that said fund is not only not being invested in safe interest-bearing or dividend producing secu-

rities, but that the same is being dissipated by said defendant.

15. That the adult plaintiffs herein under the will of the said Frances M. Lightner, and under the agreement hereinbefore alleged, have a contingent interest in said fund in that they become the owners thereof in the event the plaintiff, Martha Penelope Boone, should die prior to the full distribution of said fund for the purpose for which it was created, and because of such interest, are proper and necessary parties to this action.

16. That because of the minority of the plaintiff, Martha Penelope Boone, it is the duty of the court to see that said fund is properly held, managed and invested for the benefit of said plaintiff, and to require proper accountings by the said defendant with respect thereto.

Wherefore, the plaintiff asks:

1. That judgment be entered declaring the defendant trustee of said funds under the terms and provisions set forth in the will of the said Frances M. Lightner for the management, investment and control of the trust fund therein created for the other grand-children of said testator, and that the Advisory Committee therein created be adjudged to have the same authority and control over said fund as it has over the trust fund created by said will as declared by the judgment hereinbefore referred to and of which Exhibit B hereof is a copy.

2. That said defendant be required to disclose the nature and character of the securities in which said trust fund is invested, and the amount of interest or dividends that are [fol. 8] being received therefrom, and the disposition that is being made of same.

3. That said defendant be required to show to the court that said fund has been kept intact and that it is invested in safe, interest bearing or dividend producing securities, and that he required to report to the court at regular intervals the status of said fund, and the manner in which the trust herein alleged is being executed.

4. That in the event of the failure of said defendant to fully account for all of said funds, or to show that said funds are invested in safe, solvent securities, that he be removed

as Trustee, and that some other competent, suitable and responsible person be appointed in his stead.

5. For the costs of this action and such other and further relief as to the Court may seem just and equitable.

Massenburg, McCowan & Arledge, J. E. Shipman,
Attorneys for Plaintiffs.

(Verified)

Exhibit "A" to Complaint

LAST WILL AND TESTAMENT OF FRANCES M. LIGHTNER

I, Frances M. Lightner, of Tryon, Polk County, North Carolina, being of sound mind and disposing memory, but considering the uncertainty of my earthly existence, declare and publish the following as my last will and testament, hereby revoking and declaring utterly void all former Wills, Testaments and Codicils by me heretofore at any time made.

First: I direct my Executor, or his successors, hereinafter named, to pay all my just debts, including funeral expenses, suitable monument, and I specifically direct that all taxes, succession, inheritance, estate, transfer, gift or whatsoever called or named, to be paid out of the funds of my estate, whether levied against my estate or any beneficiary [fol. 9] or beneficiaries named in this my last will. It is my express purpose that no taxes be charged against any of the inheritance they receive or to be received.

Second: I give, bequeath, devise and transfer to my Executor and/or my Trustee hereinafter named, all of my personal property, wheresoever situate, of which I may die seized, or possessed, or to which I may be entitled at the time of my death, or afterwards, to my Executor and/or Trustee hereinafter named, for the following uses and purposes to hold as Trustee, in the manner following:

I give, bequeath, devise and transfer to my Trustee, hereinafter named, all my real estate, wheresoever situate, of which I may die seized, or possessed, or to which I may be entitled at the time of my death, or afterwards, to my Trustee, hereinafter named, outright, in fee, for the following uses and purposes, to hold as Trustee, to dispose of and handle as directed in this my last will and testament.

(1) I direct my Trustee to pay to my husband, Clarence A. Lightner, or to any person, firm or corporation for him, in event of his incapacity, the entire net income from the trust property and estate at monthly intervals during his lifetime. Any accrued income at date of his death shall revert to the principal of my estate and shall not be considered due to the estate of my husband.

(2) Upon the death of my husband, Clarence A. Lightner, I direct that my Trustee pay his just debts, funeral expenses, suitable monument, taxes, and then to pay over, transfer, assign deed and deliver all the rest, residue and remainder of my trust property and estate to my children as follows:

Theodore Alexander Lightner, son, one-fourth;
Clarence McGraw Lightner, son, one-fourth;
Alice Lightner Hopf, daughter, one-fourth;
Martha Lightner Boone, daughter, one-fourth, except [fol. 10] that Theodore Alexander Lightner, my son, because of monies previously borrowed from his inheritance, shall pay from his inheritance, the sum of fifteen thousand dollars ($15,000.00) to be divided equally between my three other children.

Should any of my children wish to purchase the homestead, including all personal property used in, around or about the homestead, furniture, fixtures, outbuildings, etc., known as "Seven Mountains" at Tryon, North Carolina, it is my wish and I direct my Trustee to arrange a conveyance of same to the child offering the highest amount for same, on reasonable terms. Said price and terms to be for the best interest of the estate.

I hereby bequeath to my beloved son-in-law, Daniel F. Boone, the sum of Five Thousand Dollars ($5,000.00) in consideration of his devotion and attention to Mr. Lightner, myself, and for the management of our properties, both for Mr. Lightner, myself and our children, and for recovery of various stock and securities for our estate, said services being rendered during our lifetime. This legacy is only a small part of the amount actually recovered for our benefit.

(a) In the event any of my said children shall have died prior to the death of my husband, Clarence A. Lightner, leaving a spouse or bodily issue, then it is my intention and I direct my Trustee, or his successor, to hold in trust, upon

the terms and conditions as herein provided, the share such deceased child would have taken, and if the spouse of such deceased child be living and such deceased child leave issue, pay over, during the life of such trust, to such spouse one-fourth (¼th) of the income from the share of such deceased child and as long as such spouse not remarry, and pay three-fourth's (¾ths) of the income from the share of my deceased child to the issue of my deceased child in equal proportions, and until such time as said trust is terminated as hereinafter provided.

[fol. 11] (b) In the event no spouse survives my deceased child, or in the event of the death or remarriage of such spouse during the term of the trust as herein provided and if any issue of my deceased child shall be living after the death or remarriage of such spouse, then all income from such share, so held in trust, and until the termination of said trust, shall be paid to the issue of such deceased child in equal proportions.

(c) It is my intention and I further direct my Trustee, upon the youngest of such issue of my deceased child reaching the age of twenty-one (21) years, then the trust herein established for the share of such deceased child of mine shall terminate and my Trustee, or his Successor, shall pay over, transfer, assign and convey to the living issue of such deceased child of mine, share and share alike, all the corpus and residue of such trust estate; and in the event any of said issue of my deceased child shall have died prior to reaching the age of twenty-one (21) years, leaving issue, then such issue to receive in equal proportions the deceased parent's share. In the event all issue of my deceased child die prior to reaching the age of twenty-one (21) years, and without leaving issue, and upon the death or remarriage of the spouse of such deceased child, I direct my Trustee to transfer, assign and convey the corpus of such trust estate to my children, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(d) In the event any of said children shall have died prior to the death of my husband, Clarence A. Lightner, leaving a spouse but without leaving bodily issue, or, in the event all issue of my deceased child die without leaving issue, prior to all reaching the age of twenty-one years, then it

is my intention and I direct my Trustee, or his successor, to assign, transfer and convey to such spouse of my de- [fol. 12] ceased child one-fifth (1/5th) of the corpus of the estate which such deceased child of mine would have taken, and I direct my Trustee, or his successor, to hold in trust, upon the same terms and conditions, as herein provided, four-fifths (4/5ths) of the said share that such deceased child of mine would have taken, and pay over to said spouse the income from such trust so long as such spouse lives and does not remarry; and upon the death or remarriage of such spouse, the remainder of the corpus of the estate of such deceased child of mine shall be thereupon distributed to my children, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(3) In the event any child of mine shall have died prior to the termination of the trust for my husband, Clarence A. Lightner, without leaving bodily issue and without leaving a spouse, then such living children of mine shall take all the share that such deceased child of mine would have taken, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(4) If, in the opinion of the Trustee, the income herein provided shall not be sufficient to suitably support and maintain my husband, Clarence A. Lightner, or in the case of any emergency such as illness, accident or extraordinary distress, then the Trustee shall, if he deems it advisable so to do, use and spend such part of the principal of the trust estate as may be necessary to make up such deficiency or meet such emergency.

(5) No stock dividends, or rights to subscribe for stock, whether availed of or sold by the Trustee, shall be considered as income, but the same shall be considered as an increment in value of principal and added to the principal of the Trust Estate, after deducting therefrom, as a charge against the same, all income taxes payable with respect [fol. 13] thereto. All cash dividends excepting liquidating dividends shall be considered as income.

After the termination of Paragraph I, and before Paragraph II become operative, I direct my Executor and/or Trustee to pay over, set aside, transfer to a separate trust

fund, the sum of $40,000.00, either in cash, stocks, bonds or other securities, such property in kind, other than cash, to have a value of at least $40,000.00, to be held separate and apart from any other provision of this my last will and testament, by my Trustee for the following uses:

(a) This fund is to be held intact both to principal and income by my Trustee for all of my grand-children alive at the date of my death. After-born grand-children are specifically not included in this trust. My Trustee is to use the income and/or the principal if needed for the proper college education of my grand-children who desire to attend a Grade-A American institution for a 4-year period of college attendance immediately after they finish their course in High School, Junior College or its equivalent. It is my desire that each of my grand-children have an undivided pro rata interest in this entire fund, such interest to be determined by the number of grand-children living at the date of my death. My Trustee is directed to pay the tuition, board, room rent and necessary books for each year's attendance in college for each grand-child for a 4-year period. Said grand-child shall not expend more than their pro rata part of such funds for each school year. I direct my Trustee to set up their pro rata interest and then divide such interest into four equal payments, and expend the one-fourth (¼) share each school year, if necessary, but not to exceed the one-fourth (¼th) share. If any grand-child should not use his pro rata share for the school year, then it is my intention for my Trustee to pay over to such grand-child not using his pro rata part to him or her directly, after completion of each successful year. My Trustee, [fol. 14] Daniel F. Boone, together with his advisory committee, Dr. Arthur B. McGraw and Theodore A. Lightner, is to have sole discretion in the manner of deciding and pro-rating such part. In case of difference of opinion in settling any matter in this trust, it is my desire that two of the three above named as Executor, Trustee or Advisory Committee be the deciding factor. It is my further wish that this trust be terminated as to each grand-child as and when reaching the age of thirty (30) years.

(b) I further direct that if my grand-children mentioned above do not attend college and graduate successfully from a credited Grade-A American institution, my Trustee shall

transfer such grand-child's pro rata to the other grand-children completing such course. If none of my grand-children finish their credited 4-year course in college, and are thereby not entitled to the balance remaining in said fund, then the balance of said fund shall go to my children equally, and in case of the death of any of my children, to their issue then surviving.

Third: Should my husband, Clarence A. Lightner, predecease me, I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, of which I may die seized, or possessed, or to which I may be entitled, to my children, as follows:

Theodore Alexander Lightner;
Clarence McGraw Lightner;
Alice Lightner Hopf; and
Martha Lightner Boone; if then living, and in the following proportions:

One-fourth (¼th) to my son, Theodore Alexander Lightner;
One-fourth (¼th) to my son, Clarence McGraw Lightner;
One-fourth (¼th) to my daughter, Alice Lightner Hopf; and
One-fourth (¼th) to my daughter, Martha Lightner [fol. 15] Boone, except that Theodore Alexander Lightner, my son, because of monies previously borrowed from his inheritance, shall pay from his inheritance, the sum of Fifteen Thousand ($15,000.00) Dollars, to be divided equally between my three other children.

(1) Should any of my children predecease me, leaving a spouse or bodily issue, and should my husband, Clarence A. Lightner, also predecease me, whereby the trust as established in paragraph second on my will shall not become effective, then, I give, devise and bequeath all of that share of my estate and which such deceased child of mine would have taken, unto Daniel F. Boone, of Winston-Salem, North Carolina, to hold as Trustee, in the manner following:

(a) To hold in Trust upon the same terms and conditions as herein provided, the share of such deceased child would have taken and if the spouse of such deceased child be living and such deceased child leave issue, I direct my Trus-

tee, during the life of such trust, to pay over to such spouse one-fourth (¼th) of the income from the share of such deceased child so held in trust and so long as such spouse does not remarry and three-fourths (¾ths) of the income from the share of such deceased child to be paid to the issue of such deceased child in equal proportions, and until such time as said trust is terminated as hereinafter provided.

(b) In the event no spouse survives my deceased child, or in the event of the death or remarriage of such spouse during the term of the trust, as herein provided, and if any issue of my deceased child shall be living after the death or remarriage of such spouse, then all income from such share, so held in trust, and until the termination of said trust, shall be paid to the issue of such deceased child in equal proportions.

(c) It is my intention and I further direct my Trustee, [fol. 16] upon the youngest of such issue of my deceased child reaching the age of twenty-one (21) years, then the trust herein established for the share of such deceased child of mine shall terminate and my Trustee, or his successor, shall pay over, transfer, assign and convey to the living issue of such deceased child of mine, share and share alike, all the corpus and residue of such trust estate; and in the event any of said issue of my deceased child shall have died prior to reaching the age of twenty-one (21) years, leaving issue, then such issue to receive in equal proportions the deceased parent's share. In the event all issue of my deceased child die prior to reaching the age of twenty-one (21) years, and without leaving issue, and upon the death, or remarriage of the spouse of such deceased child, I direct my Trustee to transfer, assign and convey, the corpus of such trust estate to my children, share and share alike, the issue then living of a deceased child of mine to take the parent's share by right of representation.

(d) In the event any of my children predeceases me without leaving bodily issue, but leaving spouse, or in the event all issue of deceased child die, without leaving issue, prior to reaching the age of twenty-one (21) years, then it is my intention and I direct my Trustee, or his successor, to assign, transfer and convey to such spouse of my deceased child, one-fifth (1/5th) of the corpus of the estate which such deceased child of mine would have taken, and I direct my Trus-

tee, or his successor, to hold in trust, upon the same terms, and conditions as herein provided, four-fifths (4/5ths) of said share that such deceased child of mine would have taken, and pay over to said spouse the income from such trust so long as such spouse lives and does not remarry and upon the death or remarriage of such spouse, the remainder of the corpus of the estate of such deceased child of mine shall be thereupon distributed to my children, share and share alike, the issue then living of a deceased child of [fol. 17] mine, to take ~~the~~ parent's share by right of representation.

(e) In the event my husband, Clarence A. Lightner, predeceases me, and in the event any of my children predecease me, without leaving bodily issue and without leaving a spouse, then such living children of mine shall take all the share that such deceased child of mine would have taken, share and share alike, the issue then living of a deceased child of mine, to take the parent's share by right of representation.

(2) No stock dividends, or rights to subscribe for stock, whether availed of or sold by the Trustee, shall be considered as income, but the same shall be considered as an increment in value of principal and added to the principal of the Trust Estate, after deducting therefrom, as a charge against the same, all income taxes payable with respect thereto. All cash dividends excepting liquidating dividends shall be considered as income.

Fourth: I give, devise and bequeath to the Trustee, hereunder, and including all the trust that may become operative hereunder, the following powers and authority in respect to such mentioned trust estate:

(1) To take possession of said trust property and estate and collect and receive the moneys, interest, profits, and income arising therefrom, with full power in the Trustee to improve, repair and maintain any and all property belonging to said Trust Estate, and to manage the same and all said Trust Estate, as in the judgment and discretion of my Trustee may seem most advantageous to said Trust Estate, and the beneficiary thereof. Included in such power of management shall be the power to vote, in person, or by proxy, any and all stocks in any and all corporations, at

any and all meetings of stockholders, for any and all purposes, without any limitation whatsoever.

[fol. 18] (2) To retain in said Trust all properties in the form in which the same shall be received by the Trustee and to sell, either for cash or part cash and part deferred payments, convey, exchange, lease for any length of time, and with or without covenants of renewal, mortgage, pledge, partition, distribute or otherwise dispose of all of said trust property and estate, or any part thereof, or any interest therein, at such time or times and in such manner, either public or private, and upon such terms as in the absolute and uncontrolled discretion of said Trustee may seem expedient and proper, without Order of Court.

(3) In the event of any disposition whatever of any property subject to said Trust, said Trustee shall make, execute and deliver any and all such instruments in writing as shall be necessary or proper to carry out the same. Purchasers and other persons who shall pay any trust moneys to my said Trustee shall be exempt from all responsibility with respect to the application of the same, and from the necessity of inquiring into the regularity, validity or propriety of any disposition made, or purported to be made under the Trust or powers contained in this Will.

(4) To invest the funds of said Trust Estate, including the proceeds of the disposition of any of the property thereof and re-invest the same from time to time, and to keep the same re-invested in such income producing real or personal property, without being limited at any time to investments required for Trust Funds by the Laws or Statutes of the State of North Carolina, or any other jurisdiction.

(5) To distribute in kind, at a price to be fixed by the Trustee, any stocks, bonds or other securities, at any time belonging to my estate, in equal or unequal proportion to or among the persons entitled to participate in any distribution thereof. The selection of the securities for the distributions, the proportions and the prices thereof shall rest in [fol. 19] the sole judgment and discretion of the Trustee, and when selected the proportions determined and the prices fixed by the Trustee, the same shall be final, conclusive and binding upon all parties concerned therewith.

(6) To pay from time to time from the income of the Trust Estate all necessary and proper expenses incurred in connection with the management, care and preservation of said Trust Property and Estate, and upon all such expenses and charges being paid, the net income shall be paid out, used and expended as hereinbefore directed.

Fifth: I hereby constitute, appoint, name and specifically make my son-in-law, Daniel F. Boone, of Winston-Salem, North Carolina, my lawful Executor, to serve without bond, and to have the powers heretofore enumerated and to the extent of law, given by Statute. I appoint Dr. Arthur B. McGraw, Jr., of Detroit, Michigan, and Theodore Alexander Lightner, of New York, N. Y., as an Advisory Committee, to assist and advise my Executor and Trustee, Daniel F. Boone, in the administration of this, my last Will and Testament. Should Daniel F. Boone fail to serve as Executor, Dr. Arthur B. McGraw, Jr., qualifies and finishes the administration of this will, I appoint Theodore Alexander Lightner, my Executor and Trustee, any of which has the powers given by Executor and Trustee.

I hereby constitute, appoint, name and specifically make my son-in-law, Daniel F. Boone, of Winston-Salem, North Carolina, my trustee, to serve without bond, and to have the powers hereinbefore enumerated and to the extent of law given by Statute. In the event of the failure of Daniel F. Boone to act as Trustee, his successors are to act as set forth as Executors. Is his compensation for serving as Executor and/or Trustee, Daniel F. Boone, is to retain as his commission the following:

[fol. 20] 5% on the first $50,000.00 Receipts.
3% on the next $450,000.00 Receipts.
1½% on all over $500,000.00 Receipts.

No compensation is to be paid to the Advisory Committee, however, the Successor, Executor and/or Trustee, if any, shall be paid the same commission as allowed Daniel F. Boone.

In Witness Whereof, I have set my hand and seal, this the 23rd day of May, 1938, at Tryon, North Carolina.

(s) Frances M. Lightner (Seal).

Signed, sealed, published and declared by the said Frances M. Lightner, and for her last Will, in the presence

of us, who, at her request, and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Sarah Elliott, Columbus, N. C.; Norman J. Collins, Tryon, N. C.

EXHIBIT "B" TO COMPLAINT

STATE OF NORTH CAROLINA, POLK COUNTY

IN THE SUPERIOR COURT, JANUARY-FEBRUARY TERM, 1940

DANIEL F. BOONE, Extr.,

v.

THEODORE A. LIGHTNER, et al.,

Judgment

This cause coming on to be heard before His Honor, Frank M. Armstrong, Judge presiding at the January-February, 1940 Term, Superior Court of Polk County, upon the petition of Daniel F. Boone, Executor and/or Trustee of the Will of Frances M. Lightner, deceased, and

It appearing to the Court that all of the devisees and legatees, and the Advisory Committee named in said Will are parties defendant, and that the infant defendants, Theodore A. Lightner, Jr., Daniel Lightner Boone, and Claudia Lightner, are represented herein by their duly appointed [fol. 21] Guardian ad litem, Walter Johnston, Jr., who has filed an answer for them, and that all of the parties defendant, as well also as the petitioner, are asking the Court to construe the Will of said testatrix, and to advise and direct the Executor and/or Trustee as well also as the Advisory Committee as to their duties with respect to the Trust Fund provided for in said Will, and the administration of said estate;

And the Court being of the opinion that under said Will, it is the sole duty of Daniel F. Boone, as Executor and/or Trustee to set up the Educational Trust Fund provided for therein for the minor defendants hereinbefore named, and to determine the personal assets that shall constitute said Trust Fund, and

It further appearing that after the death of Clarence A. Lightner, who died December 8, 1938, to-wit: On August 24, 1939, the said Daniel F. Boone, as Executor and/or Trustee set up the Trust Fund provided for said minor defendants consisting of the following securities, namely:

Insurance Co. of North America, 53 shares at $64.50 per share	$ 3,418.50
McGraw Electric Company, 380 shares at $19.75 per share	7,505.00
Chrysler Corporation, 100 shares at $74.12½ per share	7,412.50
E. I. duPont de Nemours Co., 50 shares at $157.62½ per share	7,771.25
S. S. Kresge Company, 125 shares at $23.75 per share	2,968.75
Nelson, Baker & Company, 2,759 shares at $3.00 per share	8,277.00
Youngstown Sheet & Tube Company, 70 shares at $36.00 per share	2,520.00
[fol. 22] Cash	17.00
	$40,000.00

It is therefore Ordered and Adjudged that the said Trust Fund as set up and established by said Executor and/or Trustee be, and the same is hereby in all respects approved and confirmed and that said securities hereinbefore listed shall constitute said Trust Fund.

The Court being further of the opinion that the Advisory Committee, namely: Dr. Arthur B. McGraw, Theodore A. Lightner, and the Trustee, Daniel F. Boone, each have an equal duty in the administration of said Trust where some difference of opinion arises in settling any matter in this trust.

It is further ordered that it is the duty of said Advisory Committee and said Trustee to administer said trust fund in accordance with the provisions of said Will, and that it is the duty of the Trustee, if any change is made in the trust hereinbefore set up or referred to in this judgment, that he confer with said Advisory Committee; and in the event there is some difference of opinion as to a change in said trust fund herein set up, that the decision of a majority of said number shall be controlling and binding.

The Court further being of the opinion that the provisions made for the compensation of the Executor and/or Trustee in said Will is determinative of the amount to which he is entitled in full for all services rendered by him in connection with the administration of said estate both as Executor and/or Trustee and that under said Will the said Executor and/or Trustee is not entitled to any attorneys' fees for himself, personally.

The Court being of the opinion that under the provision of the Will that the Executor and Trustee as compensation [fol. 23] for acting as Executor and Trustee, is entitled to 5% on all receipts up to the first $50,000.00, and 3% on all receipts up to the next $450,000.00.

The Court in construing the Will has done so without prejudice to any rights of attorneys' fee which Daniel F. Boone may be entitled as a result of any contract he may have with the beneficiaries of the estate of the late Frances M. Lightner, and the said Daniel F. Boone.

It is further ordered that a full and complete audit be made of all the books and records of said Executor and/or Trustee and that all the assets that belong to said estate be ments and expenditures made by said Executor and Trustee ascertained and reported therein as well as the disburseso that audit will reflect fully in detail the true and correct status of said estate, as far as same can be ascertained by said auditor.

It is further ordered that H. C. Northrop, Certified Public Accountant, Independence Building, Charlotte, North Carolina, be hereby appointed to make said audit and when same is completed one copy thereof is to be filed with the Clerk of this Court, one delievered to the Executor and Trustee, and one delivered to M. R. McCown, attorney for the adult beneficiaries herein.

The Court is of the opinion that Two Hundred and Fifty Dollars ($250.00) is a reasonable and fair fee to pay said Walter Johnston for said services and the Executor of the Estate of the late Frances M. Lightner is ordered and directed to issue a check to him in the sum of Two Hundred and Fifty Dollars.

It also being made to appear to the Court that the adult devisees and legatees under said Will, other than Theodore A. Lightner, have been paid One Thousand Dollars each by the Executor, Daniel F. Boone, and that they have en-

[fol. 24] tered into an agreement among themselves and that when each of the other three devisees, namely: Clarence McGraw Lightner, Alice Lightner Hopf, and Martha Lightner Boone, have each been paid an additional Ten Thousand Dollars by said Executor and/or Trustee is herein specifically authorized and directed in making settlement with said devisees to comply with this provision of this judgment.

This February 2nd, 1940.

Frank M. Armstrong, Judge Presiding.

IN SUPERIOR COURT OF POLK COUNTY

ANSWER OF DANIEL F. BOONE, AS TRUSTEE—August 5, 1941

The defendant, Daniel F. Boone, as Trustee, for answer to the complaint in this cause, says:

1. For answer to paragraph one, it is admitted that Clarence M. Lightner is a resident of the State of New Mexico, and that Theodore A. Lightner and Mrs. Alice Lightner Hopf are residents of the State of New York. On information and belief, defendant admits that Martha Lightner Boone is a resident of Polk County, North Carolina, and established such residence some time during the last eight months. Further answering, defendant denies that his minor daughter, Martha Penelope Boone, is a resident of Forsyth County, North Carolina, and denies that W. C. Hague has any right to represent said minor daughter as Next Friend. Further answering, defendant alleges that he is domiciled and is a resident of Washington, D. C., and that his minor children, including said minor daughter, have been in his custody for several years. Further answering, defendant alleges that his physical residence has been in Washington, D. C., since November 1, 1940, and that his domicile and legal residence have been in Washington, D. C., since June 23, 1941, and that he and his minor daughter are not, therefore, subject to the jurisdiction of courts other than those of his domicile and residence, namely: Washington, D. C.

2. For answer to paragraph two, defendant denies that [fol. 25] he is a resident of Forsyth County, North Carolina, and denies that he is now temporarily absent from said

county, having no intention to ever resume domicile or residence therein. Defendant further admits that he is in the military service of the United States, being a Captain in the United States Army, and is stationed in the office of the Under-Secretary of War in Washington, D. C. Defendant further alleges that he is permitted to select his own residence and has actually lived and resided, since November 1, 1940, at 208 Massachusetts Avenue, N. E., Washington, D. C., and has been under a lease expiring November 1, 1941. Further answering, defendant states that on June 23, 1941, he definitely gave up his legal residence and domicile in Forsyth County, North Carolina, and from that date on acquired a new domicile and legal residence in Washington, D. C.

3. For answer to paragraph 3, defendant admits the allegations therein contained, and further answering respectfully refers to the Wills of Clarence A. Lightner and his wife, Frances M. Lightner, which said Wills are of record in Polk County, North Carolina, and are incorporated herein by reference, and defendant alleges that there is no mention in either of said Wills of the $15,449.10 fund hereinafter referred to.

4. For answer to paragraph 4, defendant admits the allegations in said paragraph, and, further answering, alleges that the matters pertaining to the will of said Frances M. Lightner, deceased, in no way relate to the $15,449.10 fund turned over to defendant at the direction of Clarence A. Lightner for "general care and education of Martha Penelope Boone."

5. For answer to paragraph 5, defendant admits the allegations therein contained.

6. For answer to paragraph 6, defendant admits the allegations therein contained.

[fol. 26] 7. For answer to paragraph 7, defendant admits the allegations therein contained.

8. For answer to paragraph 8, defendant denies all of the allegations therein contained, and, further answering, states that the only arrangement by which the $15,449.10 fund was turned over to him was stated in a letter written by Clarence A. Lightner to Martha Lightner Boone, which

said letter was dated October 11, 1938, and which was turned over to defendant by said Martha Lightner Boone after her father, Clarence A. Lightner, passed on; that a true copy of said letter is annexed hereto marked Exhibit A, and made a part hereof by reference.

9. For answer to paragraph 9, it is admitted that after the death of Clarence A. Lightner his daughter, Martha Lightner Boone, received two checks from an insurance company, which two checks totaled $15,449.10. Further answering, defendant denies the balance of the allegations contained in this paragraph of the complaint, but states that the true facts were that when Martha Lightner Boone brought the two checks to him she said that she had received them from the insurance company and turned them over to the defendant with the original of the letter, a true copy of which is marked Exhibit "A" and annexed hereto, stating at the time she turned over the two checks to the defendant and said letter from Clarence A. Lightner to her that this was the insurance money that her father had provided for and that her father had wanted defendant to have the money to expend for the general care and education of their infant daughter, Martha Penelope Boone. Further answering, defendant states that all other allegations of this paragraph of the complaint are denied as being untrue.

10. For answer to paragraph 10 of the complaint, defendant alleges that the allegations therein contained are untrue and are therefore denied.

[fol. 27] 11. For answer to paragraph 11, defendant admits that no advisory committee has been consulted or informed regarding said fund, and, further answering, alleges that there never was any request or intention on the part of the creator of the fund, Clarence A. Lightner, that any advisory committee should be consulted, said Clarence A. Lightner leaving the matter entirely to the discretion of the defendant, as is expressly stated in the letter, a true copy of which is marked Exhibit A, and annexed hereto. All other allegations of paragraph 11 of the complaint are untrue and therefore denied.

12. For answer to paragraph 12, defendant admits that he has not consulted with said advisory committee, and, further answering, denies that there was ever any direction

or request on the part of said Clarence A. Lightner that any advisory committee be consulted. Further answering, defendant has the greatest respect for the Clerk of the Superior Court of Polk County, North Carolina, but defendant states that, by the terms of the document creating said fund, he is not bound to report to any Court, and, further, that he is domiciled and resides in Washington, D. C., and it would be a great hardship and a serious expense to employ auditors and accountants to report to the Clerk of the Polk County, North Carolina, Court. Defendant respectfully alleges that said Court is without jurisdiction over the said fund or defendant's management of the same for the reasons hereinbefore and hereinafter stated. Further answering, defendant alleges that he has consulted with various investment counsel and has kept an accurate record of investments and income and, as soon as he is discharged from Walter Reed Hospital, Washington. D. C., where he is still a patient, he will engage the services of a Certified Public Accountant to have an account made up and mail a copy to Martha Lightner Boone or her counsel, it being defendant's wish at all times to cooperate reasonably with Martha Lightner Boone in connection with this matter. Further, defendant alleges that it is most unfor- [fol. 28] tunate that litigation should arise over a matter of this kind when he has never received a request from Martha Lightner Boone or any of her counsel for a statement of this account, and particularly when both Martha Lightner Boone and defendant so definitely understood from the express instructions of Clarence A Lightner what was intended, and it now definitely appears to defendant that this litigation results in an unfortunate waste of money for both Martha Lightner Boone and defendant.

13. For answer to paragraph 13, defendant admits that he is not managing said fund pursuant to any directions in the Will of Frances M. Lightner because there are no directions in that Will related in any way to said fund, nor are there any directions in the Will of Clarence A. Lightner related in any way to said fund, as this is a separate and distinct voluntary trust created by Clarence A. Lightner to be administered according to the direction of said Clarence A. Lightner contained in the document marked Exhibit A, annexed hereto and made a part hereof by reference. Further answering, defendant again points out that

he and his infant daughter, Martha Penelope Boone, are domiciled and reside in Washington, D. C.; that their physical residence has been there since November 1, 1940, and their legal domicile there since June 23, 1941. Further answering, defendant denies any and all other allegations contained in paragraph 13 which have not been heretofore specifically answered.

14. For answer to paragraph 14, defendant admits that he has not found anything in the Will of Frances M. Lightner which in any way relates to his handling of the $15,449.10 found; and, further answering paragraph 14, this defendant denies that there are any grounds for plaintiffs to have any apprehension, and further denies that any of the plaintiffs have any specific interest in said fund and denies that plaintiffs are proper parties in interest [fol. 29] to bring this action. The defendant denies all other allegations in paragraph 14 of the complaint and alleges that they are untrue.

15. For answer to paragraph 15, defendant denies that any of the plaintiffs have any interest in any portion of the $15,449.10 fund or the corpus of the items which said funds have been placed in by defendant. It is further denied that in the event of the death of defendant's minor daughter, Martha Penelope Boone, that the plaintiffs, or any of them, would have any interest in said fund other than what would be given to them by the laws of descent and distribution of Washington, D. C., which is the residence and domicile of said Martha Penelope Boone.

16. For answer to paragraph 16, defendant, although having the highest respect for the Court of Polk County, North Carolina, alleges that he and his minor daughter, Martha Penelope Boone, are domiciled and reside in Washington, D. C., and respectfully alleges that the Polk County Court has no jurisdiction over his management of said fund for his minor daughter. Defendant, however, has planned and will send a copy of the report of said fund to Martha Lightner Boone when it is ready, and this will, of course, depend on when defendant is discharged from the Walter Reed Hospital where he is now a patient, and will depend on his ability to engage the services of a Certified Public Accountant and have an audit made. Again defendant points out to the Court that he has never been requested by word of

mouth or letter by Martha Lightner Boone, or by any one of the other plaintiffs, to supply them with any information concerning his management of said fund. Defendant again expresses his willingness to cooperate with Martha Lightner Boone in this matter and regrets that said Martha Lightner Boone feels it necessary to litigate something concerning which there is positively no need to litigate; that defendant in making this statement does not waive any rights which [fol. 30] he has in this matter, but only points out to the Court that he has exercised at all times good faith in caring for this fund and most certainly will continue to do so, and if he lived in Polk County, North Carolina, he would certainly be pleased to have the cooperation and supervision of the Polk County Court.

Defendant respectfully directs the Court's attention to the fact that these same parties named as plaintiffs in this action, represented by the same counsel, professed to have apprehension about defendant's care of the trust fund established in the Will of Frances M. Lightner amounting to some $40,000.00, and defendant, learning of said claimed apprehension, brought an action in the Polk County Superior Court to have the Will of Frances M. Lightner construed and particularly to pass on defendant's work as Trustee of said $40,000.00 fund, and said Court did fully examine all of the items pertaining to said fund and the corpus of the same, and, after so doing, entered an order approving what had been done by defendant in that matter; that said proceeding was entitled: "Daniel F. Boone, as Executor, v. Theodore A. Lightner, et al.", and was heard before the Honorable Frank M. Armstrong at that time being the presiding Judge of the January-February Term of the Superior Court of Polk County, North Carolina, the original file of which is a part of the records of this Court and to which reference is hereby made.

The defendant, further answering the complaint, avers:

A. That the corpus of the trust amounted to $15,449.10 at the time that it was turned over to defendant pursuant to the directions of Clarence A. Lightner to his daughter, Martha Lightner Boone, all of which is evidenced by the letter marked Exhibit A, a true copy of which is annexed hereto and made a part hereof by reference.

[fol. 31] B. Defendant alleges that when his wife, Martha Lightner Boone, turned over the proceeds of the insurance checks to him, which proceeds totaled $15,449.10, he accepted it as trustee pursuant to the terms of the letter of the creator of the trust, which said letter is marked Exhibit A and annexed hereto. Defendant recognizes in the care of this fund that he was given certain discretionary powers in handling the money and in spending it for the general care and education of his infant daughter, Martha Penelope Boone, and he has at all times had this in mind and continues to have it in mind. Defendant further alleges that since June 23, 1941, his legal residence and domicile have been Washington, D. C., and that for that reason and for the further reason that the trust created by Clarence A. Lightner was a voluntary trust not subject to the jurisdiction of any court or restricted in any way by the terms of any will; that the court should not direct defendant to be subject to its supervision in this matter. Defendant further states that he has not consulted with Theodore A. Lightner or Dr. A. B. McGraw not because he does not think well of their opinion, but because he has found it more convenient to talk with other men well qualified to give advice on investments, and for the further reason that there was no direction or requirement of Clarence A. Lightner under the terms of the letter by which the fund was created and turned over to defendant that he ever consult with Dr. A. B. McGraw or Theodore A. Lightner regarding the same.

C. Defendant further alleges that he has handled this fund as a reasonably prudent man would have handled it; that he has used his best judgment and good faith in this matter; that he has not dissipated one penny of the fund, nor has he made any withdrawal from the fund since the day the money was turned over to him. Defendant further alleges that as soon as he is discharged as a patient at Walter Reed Hospital, Washington, D. C., and has a little [fol. 32] time in which to engage a certified public accountant, that he plans to have a statement made up as previously stated in this pleading; defendant further alleges that he is at all times anxious to conduct the affairs of this fund in such a way that it will be for the best interest of his minor daughter, Martha Penelope Boone, but he expressly denies that any of the adult plaintiffs have any interest

in the estate, and again respectfully denies that the Superior Court of Polk County, North Carolina, has jurisdiction over this fund or defendant's management of the same.

Further answering in support of the statement frequently made in this pleading that defendant and his minor daughter are domiciled and reside in Washington, D. C., defendant alleges that he left North Carolina to take up his physical residence in the District of Columbia, in October 1940, and has lived there with his minor daughter and son at 208 Massachusetts Avenue, N. E., Washington, D. C., since November 1, 1940, under a lease which does not terminate until November 1, 1941.

Defendant further states that until June 23, 1941, he had intended to return to North Carolina at some time in the future, but that on that date, because of what took place in the Superior Court of Forsyth County, North Carolina, as well as the other matters hereinafter set forth, he concluded that he definitely would terminate all of his ties bearing on his previous domicile and legal residence in the State of North Carolina, and that he would have his domicile and legal residence at the same place of his physical residence, namely: The City of Washington, D. C., and that as further evidence of the change of domicile and legal residence from North Carolina to the District of Columbia, defendant respectfully directs the court's attention to the following matters:

1. That defendant has not exercised his right to vote in North Carolina since the last Presidential election and is [fol. 33] no longer entitled to vote in North Carolina, and has written to the proper authorities and requested that his name be taken off the roll of registered voters.

2. That he has vacated the office in which he had property stored at Winston-Salem, North Carolina, and has ceased paying rent on the same.

3. That he has resigned as a Director of the Stokesdale Commercial Bank, of Stokesdale, North Carolina.

4. That he, on June 24, 1941, began negotiations for the acquisition by purchase of a house and lot in Washington, D. C., and that he has, subsequent to that date, purchased said home which is now being completed and which defend-

ant expects to move into within the next two or three weeks.

5. That on June 24, 1941, he dictated and executed a new Will setting forth in said Will that his legal residence and domicile was Washington, D. C., and no longer Winston-Salem, North Carolina.

6. That defendant's minor son, Daniel L. Boone, aged 6, has been regularly enrolled in a private school in Washington, D. C., during the school year of 1940-1941, and is now in a summer school.

7. That defendant and his minor children have terminated their affiliations with churches in Winston-Salem, North Carolina, and since coming to Washington, D. C., in November 1940, have become affiliated with a church in Washington, D. C.

8. That defendant has been a member of a Masonic Lodge known as Federal Lodge No. 1, since 1927, and that said Lodge has its place of meeting and Lodge Hall in Washington, D. C., and defendant has regularly kept up his [fol. 34] membership in said Lodge since 1927, having in mind that some day he would make Washington, D. C., his place of legal residence and domicile which he has now done as of June 23, 1941. Defendant further states in this connection that prior to June 23, 1941, he had definitely expressed himself many times as being temporarily absent from North Carolina on military duty, but after the testimony had been finished on June 23rd, 1941, defendant then and there concluded that he would never again return to North Carolina to take up his legal residence and domicile but would in the future have his legal domicile and legal residence in Washington, D. C.

9. That defendant has requested the tax authorities of North Carolina to take his name off the personal property tax roll and by letter from said tax authorities has been advised that his name has been removed from the roll.

10. That defendant has, since June 23, 1941, disposed of other property holdings in the State of North Carolina, having in mind that his legal residence and legal domicile since June 23, 1941, is Washington, D. C., and no longer Winston-Salem, North Carolina.

11. That defendant has no intention of maintaining property interests in the State of North Carolina or of resuming legal residence or legal domicile there at any time in the future.

12. Defendant further has in mind that both he and his children have been seriously disgraced in North Carolina by the action of Martha Lightner Boone in that Martha Lightner Boone had improper relations with men at times when she was the wife of the defendant and that information regarding the same has been widely publicized in the newspapers throughout North Carolina, and that if there were no other reasons, of which there are many, defendant would still decline to return to North Carolina to make his physical residence, legal residence and legal domicile, or any of them, there.

[fol. 35] 13. Defendant further states that he is of the definite opinion and belief that his appointment as a Captain in the United States Army is likely of long duration, at least that his present appointment will prevail during the emergency confronting the country; and, due to the further fact that defendant received his legal education in the City of Washington, D. C., and has spent more years of his adult life in Washington, D. C., than he has in the State of North Carolina, and has more friends and acquaintances in Washington, D. C., than he has in North Carolina, that it will be undoubtedly a better place for him to live when he returns to civilian life after the emergency is over, and that in any event defendant will never again take up his physical residence, legal residence or legal domicile in North Carolina.

14. Defendant further says that in Washington, D. C., he has many business contacts, Army contacts, social contacts, contacts of personal nature with the leaders in all fields, and definitely feels that it is decidedly to his interest and to the interest of his children that he continue to make his legal residence and legal domicile in Washington, D. C., where he has maintained a home and has now acquired by purchase a home in a fine residential district where it will make a fine home for said minor children.

Wherefore, defendant prays that this cause of action be dismissed on the grounds hereinbefore stated, including the

ground that the courts of North Carolina do not have jurisdiction over the management of the voluntary trust fund created by Clarence A. Lightner, deceased, for the further reason that the defendant and his minor daughter, Martha Penelope Boone, have their physical residence, legal residence and legal domicile in Washington, D. C., and not in North Carolina, and that the defendant may have such other and further relief in the premises as may seem [fol. 36] just and proper including the awarding of costs to defendant.

Daniel F. Boone.

Dated: August 5, 1941.

Roy L. Deal, 1505 Reynolds Building, Winston-Salem, North Carolina, Attorney for Defendant.
Clifford M. Toohy, 1903 Dime Bank Building, Detroit, Michigan, of Counsel for Defendant.

(Verified).

EXHIBIT "A" TO ANSWER

Assignment and Request to Martha Lightner Boone

DEAREST MARTHA:

Under date of August 8th, 1938, I made requisition upon the New England Life Insurance Company to make you sole beneficiary of my Life Insurance Policies Nos. 167481 and 168553.

Realizing that under the terms of the Will of my beloved wife, there was no financial provision made for the care and education of your daughter born September 14, 1938, it is my wish that the proceeds from above mentioned Insurance Policies be transferred to my son-in-law, Daniel F. Boone, who is the Executor of my Will, and that he be given the proceeds from these policies to expend for the general care and education of my granddaughter, Martha Penelope Boone.

Affectionately yours, (Signed) Clarence A. Lightner.

Signed: W. D. Parris.

IN SUPERIOR COURT OF POLK COUNTY

REPLY

The plaintiffs, replying to the answer of the defendant, [fol. 37] without waiving the right to all of the denials which the law makes for them, and expressly reserving the right to insist on all such denials, say and allege:

1. That the allegations contained in paragraph 8 of said Answer are untrue and are denied, and in this connection the plaintiffs reiterate the allegations of their complaint in this regard and particularly the allegations of paragraph 8 thereof. The plaintiffs expressly deny that the letter therein referred to, of which Exhibit A, attached to the answer, is alleged to be a copy, was ever delivered to the plaintiff, Martha Lightner Boone, by her father, Clarence A. Lightner, or that said paper writing was ever delievered by her to the defendant. The plaintiffs further allege that none of them ever heard of said paper writing until they saw what purported to be a copy of same attached as Exhibit A to said answer. The plaintiffs further expressly allege that the agreement with respect to the establishment of said trust made between the said Clarence A. Lightner, Martha Lightner Boone and Daniel F. Boone was entered into prior to October 11, 1938, and prior to the birth of Martha Penelope Boone, which occurred September 14, 1938. In this connection, the plaintiffs further allege that the said paper writing referred to in said paragraph and in many subsequent paragraphs of said answer, was written by the defendant, Daniel F. Boone, without the knowledge or consent of the plaintiff, Martha Lightner Boone, and was presented by him to the said Clarence A. Lightner for his signature when he was confined to his bed, in a coma, at a time when he was without sufficient mental capacity to execute said paper writing. That the said paper writing was thereafter held by the said Daniel F. Boone and its existence and contents concealed from the said Martha Lightner Boone and the other plaintiffs herein until the filing of defendant's answer.

2. That the allegations contained in paragraph 9 of said answer, insofar as they are in conflict with the allegations of [fol. 38] plaintiff's complaint or with the denials set forth in paragraph one of this Reply, are untrue and are denied.

Wherefore, the plaintiffs, having fully replied to all matters which the law may not have denied for them, ask that the alleged paper writing, copy of which is attached to defendant's answer as Exhibit A, be set aside, and that the relief prayed for in the complaint be granted.

Massenburg, McCown & Arledge, J. E. Shipman,
Attorneys for Plaintiffs.

(Verified by Martha Lightner Boone.)

In Superior Court of Henderson County

Issues and Verdict

May-June Term 1942

1. Is the defendant, Daniel F. Boone, a trustee of the fund of $15,449.10, referred to in the complaint and answer?
Answer: Yes.

2. If so, is the said fund subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three grand-children, as alleged in the complaint?
Answer: Yes.

3. If so, has the defendant, as trustee, administered said trust fund as provided for in said Will?
Answer: No.

4. Has said defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?
Answer: Yes.

5. What amount, if any, has the defendant received as dividends and profits on said funds?
Answer: $4,228.89.

[fol. 39] 6. Was Clarence A. Lightner, on October 11, 1938, without sufficient mental capacity to execute the paper writing alleged in defendants' answer, and copy thereof annexed thereto as Defendant's Exhibit No. 1, as alleged in the plaintiffs' Reply?
Answer: Yes.

In Superior Court of Henderson County

Judgment—May 26, 1942

This action was commenced in the Superior Court of Polk County, North Carolina, by the issuance of a summons and the filing of the complaint on June 21, 1941. The Sheriff of Forsyth County, N. C., (of which county the defendant was then a resident) served the summons and complaint on the defendant personally at Winston-Salem, N. C., on June 23, 1941. The court has jurisdiction of the parties and of the subject matter of the action.

The complaint alleges that the plaintiff, Martha Lightner Boone, turned over to the defendant the proceeds of two policies of insurance on the life of her late father, Clarence A. Lightner, in which she was beneficiary. There is no dispute about the amount, which is admitted to be $15,449.10. The complaint further alleges that said funds were to constitute a trust fund for the plaintiff, Martha Penelope Boone, subject to the same management, provisions and terms, as a trust fund created by the Will of Frances M. Lightner, the grandmother of Martha Penelope Boone, for her other three grandchildren, in which Daniel F. Boone, the defendant, was named trustee, with Dr. Arthur B. McGraw and Theodore A. Lightner, as Advisory Committee; that said Will had been construed by this Court in a judgment rendered by Judge Frank M. Armstrong, dated February 2, 1940; that the defendant had not rendered an accounting of said trust fund, and that the plaintiff's were apprenhensive that said fund was being mismanaged and dissipated. In the prayer the plaintiffs sought a decree to determine the provisions of the trust, an accounting, and the removal of the trustee in the event of mismanagement [fol. 40] or improper handling of the trust funds, together with other and further relief consistent with the oversight and protection by the court of the interests of the minor plaintiff.

The defendant duly filed an answer in which he admitted the receipt of the sum of $15,449.10 from Martha Lightner Boone, and that said sum constituted the proceeds of two policies of insurance on the life of Clarence A. Lightner, in which Martha Lightner Boone was named beneficiary. He admitted the trust character of the funds but denied that the terms and provisions of the trust were to be in accordance

with the Will of Frances M. Lightner and contended that the provisions of the trust were determined by a letter from Clarence A. Lightner to Martha Lightner Boone, dated October 11, 1938, a copy of which was made a part of the answer.

The plaintiffs filed a reply denying all knowledge of said letter and asserting that Clarence A. Lightner was without mental capacity on October 11, 1938, to execute the said paper writing.

This cause was regularly calendared for trial at the January-February Term 1942 of Polk County Superior Court, at which time the defendant, through his counsel, Roy L. Deal, Esq., of the Winston-Salem bar, made a motion for a continuance, which appears in the record. The court granted the continuance in a written order dated February 2, 1942, which is a part of the record, and in which the court transferred the cause to Henderson County Superior Court and gave notice in said order that the cause would be tried on May 25, 1942, the first day of the May-June 1942 Term of said Henderson County Superior Court, peremptorily setting the same to avoid undue delay to anyone. When said motion was argued, Mr. Deal stated that he expected to be called into service in the U. S. Army and that he would be unable to try the case and requested that the case be continued until May 25, 1942, in order to give the [fol. 41] defendant ample time to employ other counsel.

Upon the call of the calendar at the May-June 1942 Term of Henderson County Superior Court, the defendant, through R. R. Williams, Esq., of the Asheville, N. C. bar, lodged a motion for a continuance, which with the supporting affidavits is in the record. The court denied the motion and the order to this effect setting forth my findings of fact are in the record. The court finds as a further fact that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his military service has not prevented him from doing this.

In a recent case (The Sylph 42 Fed. Sup. 354) Judge Moscowitz, U. S. District Judge for the Southern District of New York, in considering the provisions of the Soldiers' and Sailors' Civil Relief Act, Chap. 888, 3rd Session, Public No. 861, 76th Congress, Sec. 302, 50 U. S. C. A. Appendix S 532, said:

"Respondent had full opportunity to put in a defense although there appears that there is no defense."

In this case is the same situation—the defendant had full opportunity to prepare and put in his defense if he had one. From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense. His failure to properly handle the trust fund or to account for the same has not been affected in any way by reason of his military service. It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride does not intend for this to be done.

Upon the call of the case, a jury was empanelled to try the issues, and the following are the issues which were sub-[fol. 42] mitted to the jury, with the answers of the jury thereto:

1. Is the defendant, Daniel F. Boone, a trustee of the fund of $15,449.10, referred to in the complaint and answer?
Answer: Yes.

2. If so, is the said fund subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three grandchildren, as alleged in the complaint?
Answer: Yes.

3. If so, has the defendant, as trustee, administered said trust fund as provided for in said Will?
Answer: No.

4. Has said defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?
Answer: Yes.

5. What amount, if any, has the defendant received as dividends and profits on said funds?
Answer: $4,228.89.

6. Was Clarence A. Lightner, on October 11, 1938, without sufficient mental capacity to execute the paper writing alleged in defendants' answer, and copy thereof annexed thereto as Defendants' Exhibit No. 1, as alleged in the plaintiffs' Reply?
Answer: Yes.

It is therefore, on motion of McCown & Arledge, and J. E. Shipman, attorneys for the plaintiffs, Considered, Ordered, Adjudged and Decreed:

1. That the defendant, Daniel F. Boone, received the sum of $15,449.10 from Martha Lightner Boone as a trust [fol. 43] fund for the education and benefit of Martha Penelope Boone, the daughter of said Daniel F. Boone and Martha Lightner Boone, subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three grandchildren, which will was construed in the judgment of Judge Frank M. Armstrong, presiding over the Polk County Superior Court, dated February 2, 1940.

2. That the said fund has been increased by dividends and profits in the sum of $4,228.89, and that the defendant, Daniel F. Boone, individually is accountable for the total of the two sums mentioned, that is to say, the total amount of $19,677.99.

3. That the said defendant has turned over and delivered to the Clerk of this Court, pursuant to the order made in this cause by the undersigned Judge, dated February 2, 1942, the following:

U. S. Postal Money orders aggregating $697.93
200 Shares North American Aviation, Inc., par $1.00 common Certificate #B88-033 and B 88-034
100 Shares The Baldwin Locomotive Works, par $13.00 common Certificate #NV 30828

—

C

500 Shares Curtis-Wright Corporation, par $1.00 common 5 certificates each for 100 Shares Certificates D25862-3-4-5-6
100 Shares The Greyhound Corporation, no par common Certificate #N 86916
U. S. Bonds as follows:
$100.00 Series D #C3097532D
$100.00 Series D #C3097533D.

4. That this Court takes judicial notice of the value of [fol. 44] the said U. S. Bonds, as stated on the face of the same, and of the value of the said stocks all of which are listed on the New York Stock Exchange and quoted daily,

and using the closing quotation of May 25, 1942, the court values said assets as follows:

U. S. Postal Money Orders	$ 697.93
100 Baldwin @ 10⅝	1,062.50
500 Curtis Wright @ 6⅛	3,062.50
100 Greyhound @ 11⅜	1,137.50
200 North American Aviation @ 10⅜	2,075,00
U. S. Bonds as follows:	
$100.00 Series D #C 3097532D	76.00
$100.00 Series D #C 3097533D	76.00
Total	$ 8,187.43

5. One of the remedies sought by plaintiffs is the removal of the defendant as trustee and the appointment of a substitute trustee. It was held by the North Carolina Supreme Court, in the case In Re Smith's Estate, 200 N. C. 272, 156 S. E. 494 (which was tried by the undersigned Judge in the Superior Court) that

"The creation of trusts and the rules by which the conduct of trustees is governed fall properly within the jurisdiction of courts of equity. It is but reasonable that these courts, after having called the equitable title into existence, should continue to exercise over it a constant care and supervision. Equity affords this protection by appointing and removing trustees, by superintending their discharge of the duties of the trust, by regulating their liability, by filling a vacancy or vacancies in the office of trustee, and finally, by affording the trustees, upon a proper application and upon proper cause shown, the advice and assistance of the court."

That this Court has the power of removal in this case cannot be doubted.

[fol. 45] The jury found that the defendant, as trustee, failed to administer the trust fund in accordance with the provisions of the Will of Frances M. Lightner and that the defendant failed to administer the trust fund as by law required of trustees. The Court is of the opinion and so holds, that this finding is sufficient to justify the removal of the defendant as trustee.

The Court is of the further opinion that this record shows specifically further acts of dereliction and malfeas-

ance on the part of the defendant in fulfilling his obligations as trustee. The record shows that the defendant deposited said trust funds in the Wachovia Bank and Trust Company of Winston-Salem, and subsequently withdrew practically the entire amount and used the same in marginal stock speculation on the New York Stock Exchange. In dealing in this manner, he received many checks from the stock brokers handling his accounts, redepositing some of them in the bank and then making withdrawals or using the checks for his personal purposes.

Such speculation on the part of the trustee is wrong. Under the laws of North Carolina, the trustee could not purchase said stocks with his trust funds. The bulk of the loss, however, is due to his wrongful withdrawal of the funds for his personal purposes. When called to book by the institution of this action, the trustee attempted technical and evasive tactics. In his answer, which was duly sworn to, he stated that he had not withdrawn any of the trust funds. The evidence proves the falsity of this. The Court finds the facts in accordance with the foregoing statements and concludes that the defendant, Daniel F. Boone, has mis-managed and improperly handled said trust fund; that he has dissipated and lost, through speculation and abstraction, a substantial part thereof; that he has not shown good faith and has not attempted to render a true accounting and that he is not a fit and suitable person to [fol. 46] act as trustee. It is, therefore, ordered that the said Daniel F. Boone be, and he is hereby, removed as trustee of the said fund and Martha Lightner Boone is hereby substituted as trustee in the place and stead of said Daniel F. Boone.

Let the substituted trustee give a bond in the sum of ten thousand dollars, to be approved by the Clerk of the Superior Court of Polk County, conditioned upon properly accounting for said fund. Upon the filing of said bond, Martha Lightner Boone is to hold, manage, and control the assets, constituting said trust in accordance with the provisions of the trust as herein set forth. Said trustee in the future is to file annual reports with the Clerk of the Superior Court of Polk County, it being directed that a copy of this judgment and of the bond duly certified to, be filed in said county.

6. From the amount of $19,677.99 for which Daniel F. Boone is accountable, is to be credited the said sum of $8,187.43, leaving the net sums for which Daniel F. Boone is accountable as $11,490.56, and judgment is hereby awarded against the said Daniel F. Boone, individually, and in favor of Martha Lightner Boone, as trustee for Martha Penelope Boone, in the said sum of $11,490.56.

7. The bonds and securities listed above in paragraphs three and four, together with all dividends or benefits thereon, and the proceeds of the money orders, are hereby transferred and set over and assigned to said Martha Lightner Boone, as trustee for Martha Penelope Boone, and all right, title, and interest of Daniel F. Boone therein is divested. The Clerk of this Court is hereby directed and instructed to deliver the same to said Martha Lightner Boone. The several corporations issuing said stocks and the respective transfer agents are hereby directed and required to make the transfers of said securities, that is to say, upon the presentation and surrender of the [fol. 47] above-mentioned securities and a certified copy of this judgment, the respective corporations are to issue like securities to Martha Lightner Boone, as trustee for Martha Penelope Boone.

8. It appearing to the Court that the services of the attorneys representing the plaintiffs in this action have been beneficial and advantageous in that said services have resulted, among other things, in recovering the assets above mentioned, and in obtaining the removal of the trustee, and that a fair and reasonable compensation for said services is the sum of eight hundred dollars, the said Martha Lightner Boone is hereby directed to pay to McCown & Arledge, and J. E. Shipman, the attorneys for the plaintiffs, the sum of eight hundred dollars out of the first moneys of said trust fund coming into her hands.

It is further ordered that the securities herein ordered to be turned over to Martha Lightner Boone, as trustee for Martha Penelope Boone, shall be held by said trustee until such time as in the opinion of said trustee the same can be sold advantageously and it is contemplated that such sale when made will be with the sanction of this Court (either the Resident Judge or Judge holding the Courts in the Eighteenth Judicial District approving the same) and

that hereafter the funds of this trust will be invested as is provided by law for the investment of trust funds. The fact that the securities ordered to be turned over to said substituted trustee are not securities in which trust funds may be invested under the applicable statutes shall not operate prejudicially to the substituted trustee, or to her bond, but said securities are to be held pending the further orders of this Court.

10. Let the costs be taxed against the defendant, Daniel F. Boone. Said costs are to include an allowance of $10.00 to W. C. Hague for his services as next friend of Martha [fol. 48] Penelope Boone, $25.00 to Mae A. White for her services in taking the deposition of David S. Paterson, and $2.50 to Henry F. Snow for his services in taking the deposition of G. M. Alspaugh. Said amounts are to be paid out of the trust fund pending the collection of the judgment and are to be paid to the plaintiffs who have advanced them, or to their counsel of record.

This 26th day of May, 1942.
H. Hoyle Sink, Judge Presiding.

In Superior Court of Henderson County

Exceptions and Appeal Entries—May 28, 1942

The defendant, through his counsel, Williams & Cocke, who have been employed by the defendant since the trial of the case to represent the defendant in this case, comes into Court on Thursday, May 28, A. D., 1942, and moves to set aside the verdict rendered herein. Motion overruled and the defendant excepts. The defendant excepted to the judgment signed herein and appealed to the Supreme Court. Notice of appeal given in open court and further notice waived. Appeal bond fixed at $250. Defendant is given 35 days from this date within which to serve case on appeal. Plaintiff given 35 days thereafter to serve counter-case or exceptions.

This 28th day of May, A. D., 1942.
H. Hoyle Sink, Judge Presiding.

[fol. 49] IN SUPERIOR COURT OF POLK COUNTY

ORDER CONTINUING CAUSE AND TRANSFERRING IT TO HENDERSON COUNTY.

This cause coming on for hearing on Monday, February 2, 1942, of the regular January-February Term of Superior Court of Polk County, State of North Carolina, and upon the defendant's motion for a continuance as set forth in the record, the Court heard arguments, statements and affidavits growing from and upon the question of continuing the cause, the motion for continuance is allowed, in the discretion of the Court.

The Court is of the opinion that it should at the earliest practical date ascertain the exact status of the trust fund referred to in the pleadings; the Court, therefore, without prejudice to the rights of the plaintiffs or the defendant, is of the opinion that the cause should be transferred to the County of Henderson, State of North Carolina, at the regular May-June Term 1942, Superior Court of said County; that the said transfer is ordered in the interest of the proper administration of justice and for the convenience of all parties concerned.

The Court finds as a fact that it is necessary and proper that no further transfer, sale, encumbrance or other disposition of the stocks or securities referred to in the deposition of Capt. Daniel F. Boone, dated August 15, 1941, alleged to be the property of the trust, should be made.

It is therefore, Further Ordered and Adjudged, that upon the 25th day of May 1942, that the said securities and each thereof, together with any money or evidence of indebtedness belonging to the said trust be delivered by the defendant, Daniel F. Boone, to the Clerk of the Superior Court of Henderson County, State of North Carolina, there to abide the further orders of this Court.

It is the opinion of this Court and the Court so finds as a fact, that the presence of the defendant, Capt. Daniel [fol. 50] F. Boone, at said trial is highly desirable, the Court further in this order informing counsel for plaintiffs and for defendant that at said hearing all issues arising upon the pleadings will be determined insofar as may be possible, particularly with respect to the handling and custody of the said trust fund.

As to whether the presence of the said Capt. Daniel F. Boone is necessary, the Court is leaving that to the sound discretion of the defendant and of his counsel of record.

In order that the said defendant may be fully advised, and that his superior officers may be fully advised of the importance of the litigation in question, it is directed that the Clerk of the Superior Court of Polk County, State of North Carolina, shall certify a copy of this order and forward the same to the Adjutant General of the United States Army, War Department, Washington, D. C., who shall, if he deems it necessary, submit it to such of his subordinates or superiors of the said Capt. Boone as he may deem proper.

The Clerk of the Superior Court of Polk County, North Carolina, will forthwith transfer the entire record of proceedings to the Clerk of the Superior Court of Henderson County, State of North Carolina, who will, in turn, docket the same upon the civil issue docket and set the case peremptorily, in order that no undue delay may result to anyone, on the 25th day of May, 1942.

This February 2, 1942.

H. Hoyle Sink, Judge Presiding.

To the above order, other than the portions thereof continuing the cause and directing its removal to Henderson County, the defendant excepts.

2/2/42.

H. Hoyle Sink, Judge."

This constitutes defendant's exception No. 1.

[fol. 51] In Superior Court of Henderson County

Statement of Receipts and Disbursements from January 6, 1939, to February 1, 1942, by Daniel F. Boone, Trustee for Martha Penelope Boone

Receipts

Jan. 5, 1939:

Received from Martha Lightner Boone, Exhibit A, attached hereto, entitled "Assignment and Request to Martha Lightner Boone," signed

by Clarence A. Lightner, together with two checks made payable to Martha F. L. Boone and endorsed "Martha F. L. Boone (Mrs. Daniel F. Boone)," in the total sum of (This sum deposited in the joint bank account of Daniel F. Boone and/or Mrs. Martha Lightner Boone on January 6, 1939.	$15,449.10
Dividends received from stocks	1,680.00
Total receipts	$17,129.10

Disbursements

March 8, 1939:	
Purchased 100 Shares The Greyhound Corporation Common Stock, Attached Certificate No. N86916. Net Cost (Dividends Received—$330.00)	$ 2,102.50
Oct. 19, 1939:	
Purchased 100 Shares, The Baldwin Locomotive Works, Common Stock, Attached Certificate No. NV 30828. Net Cost (Dividends received—None to date)	2,065.00
[fol. 52] Nov. 8, 1939:	
Purchased 500 Shares, Curtiss-Wright Corporation, Common Stock, Attached Certificates Nos. D258562, D258563, D258564, D258565 and D258566. Net Cost (Dividends received—$750.00)	5,320.00
Nov. 8, 1939:	
Purchased 200 shares, North American Aviation, Inc., Capital Stock. Attached Certificates Nos. B88-133 and B88-034. Net Cost (Dividends received—$600.00)	5,555.00
Mar. 8, 1941:	
Purchased $100.00 Series D, United States Savings Bonds, Certificate No. C3097533D. Net cost	75.00
Purchased $100.00 Series D, United States Savings Bonds, Certificate No. C3097532D. Net cost	75.00

Aug. 21, 1941:

Paid Norman L. Knauss, Court Reporter, for taking deposition of defendant in Washington, D. C., on Aug. 15, 1941 ..... 66.00

Aug. 16, 1941:

Paid Clifford M. Toohy, Attorney, Detroit, Michigan, for appearing and representing defendant in taking of deposition in Washington, D. C., on August 15, 1941. (This necessitated Mr. Toohy's absence from his Detroit office and being in Washington three days) .. 248.83

Nov. 3, 1941:

Paid Clifford M. Toohy, Attorney, Detroit, Michigan, for obtaining the services of Edward G. Bathon, Attorney, and appearing with Mr. Bathon in New York on November 3, 1941, at the taking of deposition of David [fol. 53] S. Patterson, on behalf of plaintiffs .. 175.00

Nov. 5, 1941:

Paid Clifford M. Toohy, Attorney, Detroit, Mich., for obtaining the services of Edward G. Bathon, Attorney, and appearing with Mr. Bathon in New York on November 5, 1941, at the taking of depositions, on behalf of the defendant, in this Trust Estate (This fee does not include services rendered in the taking of depositions in other cases on same date) 200.00

Oct. 9, 1941:

Paid to United Benefit Life Insurance Company, premium on Educational Endowment Insurance Policy on the life of Martha Penelope Boone. (Policy No. 311209 of the United Benefit Life Insurance Company, attached, is self-explanatory) 146.14

Nov. 12, 1941:

Paid William J. Flemming, Shorthand Reporter, New York, N. Y., for taking deposition on November 5, 1941, in this Trust Estate 32.25

From Aug. 4, 1941,
thru Jan. 26, 1942:

Paid Roy L. Deal, Attorney, Winston-Salem, N. C., for representing defendant (Trustee) in this estate 218.00

From July 1941,
thru Jan. 1942:

Expenses of Trustee in making necessary long distance telephone calls from Washington, D. C., to Attorneys in Detroit, Mich., Winston-Salem, N. C., and New York City 70.25

Nov. 7, 1941:

Expenses of Trustee in making trip to New York [fol. 54] City, at the taking of depositions in the Estate on November 3rd, and November 5th, 1941, (Only one-half of expenses charged and collected) 32.35

From July 1941,
thru Jan. 1942:

Miscellaneous expenses paid for statements, bookkeeping, stenographic services and postage 49.80

Expenses incurred since Judge Sink's order of February 2, 1942, are not included in this statement

	$16,431.17
Receipts	$17,129.10
Cash on hand as of February 1st, 1942	$ 697.93

This 20th day of May 1942.
(Signed) Daniel F. Boone, Trustee for Martha Penelope Boone."

And at the same time and before the convening of Court the defendant delivered to the Clerk of the Superior Court and received a receipt from the Clerk of the Superior Court for the following securities:

100 Shs. The Greyhound Corporation Common Stock, Certificate No. N86916.
100 Shs. The Baldwin Locomotive Works Common Stock, Certificate No. NV—C 30828.
500 Shs. Curtiss-Wright Corporation Common Stock, Certificates Nos. D258562, D258563, D258564, D258565, D258566.
200 Shs. North American Aviation, Inc., Capital Stock, [fol. 55] Certificate Nos. B88-033 and B88-034.
$100.00, Series D, United States Savings Bond, Certificate No. C3097533D.
$100.00, Series D., United States Savings Bond, Certificate No. C3097532D.

All of the foregoing were issued to Daniel F. Boone individually.

One United Benefit Life Insurance Company, Educational Policy No. 311209, on the life of Martha Penelope Boone with Daniel F. Boone named as beneficiary.

Money Order payable to Clerk of Court, Henderson Court for $697.93.

IN SUPERIOR COURT OF HENDERSON COUNTY

APPLICATION FOR CONTINUANCE—May 25, 1942

Now come the defendant, Daniel F. Boone, and invoking the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, prays that the Court continue the trial of this action until after the termination of his service in the Army of the United States, or until such time as he can properly conduct his defense and, in support of this application, the defendant respectfully shows to the Court:

1. The defendant is a Major in the United States Army, having been commissioned on August 18, 1925, and called into active service on November 8, 1940, by War Department Special Order No. 259, Paragraph 63, dated November 1st, 1940, and having been continuously in military serv-[fol. 56] ice since November 8, 1940, he is assigned to the International Division, Headquarters, Services of Supply,

at Washington, D. C. The work in said Division is very heavy, and full time and some extra time are required of all officers in said Division, including the defendant.

Prior to the declaration of War on December 8, 1941, the work in this Division was very heavy, but since the declaration of War the volume of work has been greatly increased. No leaves whatever have been granted, except in cases of serious emergency.

2. By reference to the pleadings in this action, it appears that the matters in issue have extended over a period of years and that they involved many personal transactions on the part of the defendant as to which the defendant's testimony will be of major importance. The trial of the action would require the bringing of some three witnesses to North Carolina from other states. Two of the witnesses are in the United States Army stationed outside of North Carolina, and the other witness resides some eight hundred miles out of North Carolina.

3. It will be noted that the defendant has pleaded in Paragraph A of his further defense of his answer a paper writing marked Exhibit A, which sets out the terms under which Clarence A. Lightner transferred said funds to the defendant, and that the plaintiffs in paragraph of their reply deny the existence and validity of said paper writing. A deposition by the defendant would be inadequate to protect his rights and interests, for the reason that the Court would not have the benefit of the defendant's personal appearance as a witness. Furthermore, in the trial of the action, it would be impossible to anticipate all of the testimony and contentions of the plaintiffs and their witnesses, and defendant's counsel would not be able properly to meet and rebut the contentions and evidence of the plaintiffs in the absence and without the immediate assistance of the defendant.

[fol. 57] 4. At the February 1942 Term of the Superior Court for Polk County, an order was made by His Honor, H. Hoyle Sink, in which the Court ordered in substance, that the defendant deliver to the Clerk of the Superior Court of Henderson County, State of North Carolina, the securities together with any money or evidence of indebtedness constituting the trust estate which is the subject matter of the litigation. The defendant will fully comply with

these provisions in the order of Judge Sink on May 25, 1942. Compliance with this order will definitely assure the Court that the trust estate of Martha Penelope Boone is, and will continue to be, safeguarded in every respect. The trial of the remaining issues in the case, which only relate to the management and the terms of the ultimate disposition of the estate may well await the time the defendant has completed his military service. In this connection, the defendant respectfully suggests to the Court that it would be to the advantage of the trust estate that the Court authorize the Clerk of the Superior Court at Henderson County to collect any income from the securities, pending the final determination of the issues in this action, which dividends and income are now being held by the respective corporation or obligors.

5. Furthermore, the defendant has employed two attorneys in this case, Mr. Clifford M. Toohy, of Detroit, Michigan, and Mr. Roy L. Deal of Winston-Salem, North Carolina; Mr. Toohy is definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days. Mr. Deal, my only North Carolina attorney in this action, has been commissioned a Major in the Army of the United States and reported for active duty on May 13, 1942. This occurred less than two weeks prior to the time set for the trial of this action and too late for another local counsel to become familiar with the case. By reason of these circumstances, the ability of the defendant to defend this action [fol. 58] will be materially affected by reason of his military service, unless the court grants the stay herein applied for; his defense will also be materially affected by the absence of his counsel.

Wherefore, the defendant prays that the Court stay the trial of this action until the defendant can personally appear in Court, and certainly until such time as his present local counsel, Major Roy L. Deal, can obtain leave to attend the trial of the case.

Clifford M. Toohy, Roy L. Deal, Attorneys for Defendant.

(Duly verified by Daniel F. Boone, defendant).

Affidavit of Roy L. Deal

District of Columbia, ss:

I, Roy L. Deal, being first duly sworn, depose and say:

When this action was first instituted, Major Daniel F. Boone employed me as local counsel and Mr. Clifford M. Toohy, of Detroit, Mich., as counsel to defend this action for him. Mr. Toohy and I prepared the answer which is on file. On May 13, 1942, I was directed by the Adjutant General of the United States Army to report to Washington, D. C., for active duty as Major in the Army of the United States, which I did. It will, of course, be impossible for me to appear as attorney in the trial of any case during the time I am in the military service, unless special permission and leave are obtained for the purpose.

Leave is obtainable only in special emergency and I certainly would not assume to ask for leave at the present time, so soon after having reported for duty.

I respectfully submit that after the defendant has complied with the terms of the order of Judge Sink at the January Term of the Superior Court for Polk County, [fol. 59] there is not special need for an immediate trial of the case.

Roy L. Deal.

(Sworn to 5-20-42).

In Superior Court of Henderson County

Order—Filed May 28, 1942

On the opening of Court, this the 25th day of May, 1942, and upon the calling of the calendar the above-entitled action, having heretofore been peremptorily transferred and set in this Court by the undersigned Judge on the 2nd day of February 1942, in the County of Polk; the Court is again presented with a motion to continue the case, supported by the affidavit of the defendant, which shall be incorporated in this Order, together with that of his counsel, Honorable Roy L. Deal, and which motion to continue was based among other things upon the ground that the defendant was relying upon the Soldiers and Sailors Relief Act, and upon further grounds set forth therein.

The Court is of the opinion, and finds as a fact, it formerly being a soldier itself, and with much respect to said

Act, referred to above, that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the Act referred to above to avoid such determination.

The Court further finds as a fact that the Honorable Roy L. Deal, at the January-February Term of Superior Court of North Carolina, in Polk County, in open Court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal, was expecting to be called immediately into military service, and that, therefore, it would be necessary for the defendant to procure [fol. 60] additional legal counsel.

The Court observes with respect to foreign counsel in the case, that there is no affidavit supporting the statement that foreign counsel could not be present, and the Court further finds as a fact that the foreign counsel has at no time intervened directly in this action before the undersigned Court.

The Court being of the opinion, and finding as a fact that the motion to continue is made after the defendant's refusel in one or more instances arising out of litigation respecting the subject matter and personnel involved in this action to appear in the Courts of North Carolina, even on citation for contempt, that the defendant is not upon the motion for continuance acting in good faith, and therefore, is not entitled to the protection provided for in the said Soldiers and Sailors Relief Act.

The Court further finds as a fact that Honorable R. R. Williams, of Asheville, N. C., being present and presenting the motion for continuance, has in all respects acted in good faith and with due diligence, and further that the said counsel, Hon. R. R. Williams, was consulted for the first time only three or four days prior to the setting of this Court, and the Court further finds as a fact from the statement of Mr. Williams that he was employed for the sole purpose of making the motion to continue as outlined above, and upon the ruling of the Court on this motion now states to the Court his purpose of declining to proceed in any respect further in the case.

Whereupon the motion to continue is denied with Exceptions duly noted by the defendant.

H. Hoyle Sink, Judge Presiding.

(Filed 5-28-42).

This constitutes Defendant's Exception No. 2.

[fol. 61] IN SUPERIOR COURT OF HENDERSON COUNTY

Thereupon, in the absence of the defendant and of any counsel representing the defendant, the Trial Judge proceeded to a trial of the case, at which time the following proceedings were had:

Examination of the Jury—As Ordered by the Court:

By Mr. J. E. Shipman, Attorney for Plaintiff:

Q. Gentlemen of the Jury, are any of you related by blood or marriage to Daniel F. Boone?

Q. Do any of you know him?

Q. This is a case in which the plaintiff is seeking to have him removed as Trustee of a trust fund, a trust fund in which he has been acting as Trustee of his young child, a little girl,—is there any reason why you couldn't sit and give both the plaintiff and the defendant a fair trial?

Q. Do any of you know the plaintiff, Mrs. Boone, a Miss Lightner, before her marriage—she lived in Tryon and lives there now; do any of you know her family? If you do hold up your hands?

By the Court: Gentlemen of the jury, ordinarily the selection of jurors to try issues born, or arising in litigation is left to counsel exclusively, but in the instant case the defendant is not present, and out of an abundance of precaution the court will examine the panel in order that both the plaintiff and the defendant may have twelve men to try the issues arising who are in no wise affected by any circumstances or subject matter within their previous knowledge or present information.

Examination of the jury on behalf of the defendant, By the Court:

Q. Counsel has stated to you that Mrs. Boone was Miss [fol. 62] Lightner, I believe from Polk County; is any member of the jury as it is now constituted related by blood or marriage to Mrs. Boone?

Q. Do you know of the family of Mrs. Boone?

Q. Or have you ever had any transaction with them, either by correspondence or by person?

Q. Gentlemen, the court further requests that if any juror would be in any wise influenced for or against the defendant, or for or against the plaintiff because of any communi-

cation or any circumstances arising in the present court relating to the motion to continue, please indicate it by holding up your hand and I shall be glad to discuss the matter further with you. The court cautions you in this respect that you will not be influenced by anything heard before the court if you were present and heard it, but only by the subject matter as it shall be introduced to you in open court, and upon which you will take the law from the court.

(The court passes the jury).

After the impanelling of the jury, and in the reading of the pleadings the Court requests the Clerk of the Superior Court to read the answer to the complaint.

By the Court: Gentlemen, the court will request the Clerk of the Superior Court, as a courtesy to the court and to the defendant, to read the answer that has been filed by the attorneys of record for the defendant.

By the Court: Gentlemen, the Court instructs you that the Clerk of Court is not interested in the litigation, but in order that you may be fully apprised of the questions arising in this action, the Court requests the Clerk to read the answer of the defendant.

The pleadings are read—the complaint by Mr. McCown, representing the plaintiffs, the answer by the Clerk of Court.

[fol. 63] In Supreme Court of Henderson County

Plaintiffs' Evidence

Offers in Evidence

Plaintiffs introduced in evidence paragraph 4 of the answer and the corresponding paragraph of the complaint.

The Court rules as follows:

The Court is of the opinion since the defendant is not present in court that the admissions should relate only to the will. The recollection of the court is that the defendant denies the allegation of the complaint to the effect that the terms of the will referred to in paragraph 4 are controlling on the trust fund in his possession.

At this point plaintiffs' counsel, Mr. McCown, reads above paragraph 4 of the answer to the jury, which refers to the will of Frances M. Lightner, deceased.

At this time the will above referred to in paragraph 4 of the complaint and answer was introduced and read to the jury, said will being annexed as a part of paragraph 4 of the complaint.

Plaintiffs Offer in evidence the first paragraph of defendant's Further Answer as follows:

"That the corpus of the trust amounted to $15,449.10 at the time it was turned over to the defendant pursuant to the directions of Clarence A. Lightner to his daughter, Martha Lightner Boone."

Martha Lightner Boone testified: My name is Martha Lightner Boone. I am the wife of Daniel F. Boone, the defendant. He and I are not living together and have not been for sometime. My father's name was Clarence Ashley Lightner. He is dead. He died December 7, 1938. Frances M. Lightner was my mother. She died in May 30, 1938, six months before my father's death. My mother had three grandchildren living at the time of her death. They were [fol. 64] Claudia Lightner, Teddy Lightner and Daniel Boone. Daniel Boone is my son and the other children are by brothers' children. I had a child born three months after my mother's death. Her name is Martha Penelope Boone and she was three years old her last birthday. She was born September 24, 1938, between my mother's and my father's death. After my mother's death I and my husband, Daniel F. Boone, had a conversation with my father with respect to Penelope. The conversation was sometime in August 1938. We were in my father's bedroom. He was sick at the time and was in Tryon. Major Boone suggested to my father that probably he would like to make some arrangement for the education of the baby that we were expecting within a month because of the fact that due to the terms of the will which Major Boone drew up for my mother to sign the children following her death were to be left out of this trust fund, that is, the grandchildren, and the amount of the educational trust fund stipulated in my mother's will was set at $40,000 because of the fact that mother expected to have four grandchildren when it would be administered and which would have been $10,000 each for their educational provisions; so Major Boone asked my father whether he would like to have some provision made where this child which we were expecting would have the education it was entitled to under my mother's will, and my father said,

"Yes, indeed", that when our baby arrived it should have the same advantages as provided for the others; and since the $40,000 left under the terms of the will for their education would amount to almost $15,000 each then he suggested that my father take his two life insurance policies which had been made to myself and my brothers and sister, for the education of our baby yet to be born; and both Major Boone and my father agreed that the trust fund which would be set up should be a trust fund carrying the same stipulations provided in my mother's will. My father said he felt very well satisfied in having such a fine advisory board to administer the trust fund. He mentioned the advisory board, Major Boone, Dr. McGraw and my brother, [fol. 65] Theodore. He said he thought the three should take the trust fund and it should be handled just as the other educational money was, I mean exactly like that under the will. I mean my mother's will. That conversation was in August. I think Major Boone received the money from insurance policies of my father after his death because he handled everything of a financial nature in my family. And he brought the checks from the policies to me to sign and turn them over to him to handle as a trust fund exactly like that under my mother's will. The policies were paid by the Insurance Company. The checks were made payable to me; and Major Boone asked me to endorse them so he could cash them. I believe they were for $14,449.10, something less than $15,000.00.

When I endorsed these checks and turned them over to him he said, "I will be glad to consult with the advisory board and handle this trust fund exactly like your mother provided for the other money to be handled." He told me that. Since he has been administering this trust fund he has not made any accounting to me. I am a party-plaintiff to this suit. As I understand it, my husband contends that the terms of the agreement for the setting up of a second trust fund were such that he was given the exclusive authority to handle that, and that he is not required to and has not accounted either to me or anyone else or to the courts.

The witness was handed a paper writing referred to in the defendant's answer and asked when was the first time that she saw the paper writing. The witness replied: "The first time I ever saw it was when it was filed in the answer to the suit we instituted last summer." I know my

father's hand writing. That is his handwriting, as his hand had to be guided the last two or three months of his life. It is a very shaky facsimile of his hand writing. At the time the insurance company honored the two policies on my father's life by issuing checks to me as the beneficiary named therein, I had not at that time seen the paper writ-[fol. 66] ing referred to and presented to me by the plaintiffs' counsel marked Defendant's Exhibit # 1, and attached to his answer. I had never heard of any such paper-writing. At the time I divested myself of the two checks that I received as the sole beneficiary of policies upon my father's life which I endorsed over to my husband, Major Boone, I hadn't at that time even seen the Exhibit alleged to have been signed by my father.

At this time the plaintiff introduced in evidence the paper writing above referred to as Defendant's Exhibit 1, for purpose of attack, which said Exhibit reads as follows:

DEFENDANT'S EXHIBIT 1

"Assignment and Request to Martha Lightner Boone:

October 11, 1938.

DEAREST MARTHA:

Under date of August 8th 1938, I made requisition upon the New England Life Insurance Company to make you sole beneficiary of my Life Insurance Policies Nos. 167481 and 168553.

Realizing that under the terms of the will of my beloved wife, there was no financial provision made for the care and education of your daughter born September 14th, 1938, It is my wish that the proceeds from above mentioned Insurance Policies be transferred to my son-in-law, Daniel F. Boone, who is the Executor of my Will, and that he be given the proceeds from these policies to expend for the general care and education of my grandaughter, Martha Penelope Boone.

Affectionately yours, (Sgd) Clarence A. Lightner.

(Sgd) W. D. Parris."

My father was a very sick man on October 11, 1938. He had a plaster cast in his left hip and on his arm. I would

say as to his mental condition he was in a state of prac-
[fol. 67] tically a coma, practically all the time, he was barely able to converse with anyone. At that time I do not think he had mental capacity to know the contents of that paper writing, what it was and its legal effect. I don't think he had any mental alertness at that time, he just barely recognized people.

Plaintiff then offered in evidence the deposition of G. M. Alspaugh, marked Plaintiff's Exhibit B, dated January 7, 1942.

By the Court:

The Court will permit this deposition and the cross-examination if counsel elects to do so.

The deposition is as follows:

PLAINTIFF'S EXHIBIT B

DEPOSITION OF G. M. ALSPAUGH

G. M. Alspaugh, being first duly sworn, deposes and says:

Direct examination:

My name is G. M. Alspaugh and my business address is Wachovia Bank & Trust Company, Winston-Salem, North Carolina. I am Supervisor of Tellers and Bookkeepers in the Commercial Department of Wachovia Bank & Trust Company and have been in that particular position for five or six years. I have been with the Wachovia Bank & Trust Company for twenty-eight years.

I am familiar with the records of accounts of depositors in the bank. The fifteen yellow papers which you hand me are copies of the original statements from December, 1938, to February 5, 1940, of the account of "Daniel F. Boone and/or Mrs. Martha Lightner Boone." The original records are kept in the regular course of business.

Plaintiff offered in evidence the following:

[fol. 68] PLAINTIFF'S EXHIBIT No. 1

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
December 1938
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement			December 1	485.03
25.00				3	460.03-S
2.00	106.38	3.87			
16.00	4.83	13.00			
1.85	17.03			5	295.07-S
10.00	1.55	1.55			
28.16	2.06	22.43		8	229.32-S
6.00				9	223.32-S
14.00	50.00	12.00			
12.00				12	135.32-S
3.00				13	132.32-S
7.00				14	125.32-S
1000.00			2,500.00	17	1,625.32-S
16.36	1.00			19	1,607.96-S
25.00	25.00			20	1,557.96-S
40.00				22	1,517.96-S
10.00				23	1,507.96-S
10.00				27	1,497.96-S
10.00	10.00			28	1,477.96-S
1.60				30	1,476.36-S

[fol. 69] PLAINTIFF'S EXHIBIT No. 2

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
January 1939
Winston-Salem

Checks Paid			Deposits	Date	Balance
	Balance from last statement			January 1	1,476.36
2.50	25.00			4	1,448.86–S
92.09	5.23	12.66			
15.09				5	1,323.79–S
500.00			15,449.10	6	16,272.89–S
100.00				7	16,172.89–S
15.00	50.00	42.15		9	16,065.74–S
15.85				10	16,049.89–S
5.25	25.00			11	16,019.64–S
6.00				13	16,013.64–S
56.00				23	15,957.64–S
1.35TX					15,956.29–S

[fol. 70] PLAINTIFF'S EXHIBIT No. 3

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
February 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement			February 1	15,956.29
15.00				9	15,941.29–S
25.00				20	15,916.29–S
6.00	29.00	6.35	349.25	23	16,224.19–S
1.11					
6.48	1000.00	15.96			
25.00				24	15,175.64–S
5.00	2.00		1.79	25	15,170.43–S
25.00				27	15,145.43–S

[fol. 71] PLAINTIFF'S EXHIBIT No. 4

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
March 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement February 28				15,145.43
2.00				28	15,143.43 S
3.10			600.00	1	15,740.33 S
25.00				3	15,715.33 S
2.00	25.00	9.50			
20.00				6	15,658.83 S
3,498.00				7	12,160.83 S
25.00				8	12,135.83 S
2,313.00	25.00	2.00		9	9,795.83 S
.80	11.25			10	9,783.78 S
2.00	25.00			13	9,756.78 S
2.40	2.00	25.00		17	9,727.38 S
25.00				18	9,702.38 S
330.00				20	9,372.38 S
4.46	25.00			22	9,342.92 S
102.84				23	9,240.08 S
3.00	5.41	15.00			
145.11	6.00			24	9,065.56 S
25.00				25	9,040.56 S
20.00	275.70		200.00	27	8,944.86 S
6.00	25.75	4.00		28	8,909.11 S

[fol. 72] PLAINTIFF'S EXHIBIT No. 5

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
April 1939
Winston-Salem

Copy

Checks Paid			Deposit	Date	Balance
	Balance from last statement March 31				8,909.11
225.00	25.00	3.00		31	8,656.11
10.00	3.88			1	8,642.23–S
4.12	20.45			3	8,617.66–S
33.32	81.35	25.00			
3.19	16.71	1,300.00			
15.63	12.00		450.00		
			102.00	4	7,682.46–S
7.15	450.00			5	7,225.31–S
33.70	40.00	7.00		6	7,144.61–S
10.95	12.00	25.00		7	7,096.66–S
6.71	25.00	1,100.00			
40.00	16.25	5.00			
25.00	7.00			11	5,871.70–S
25.00	39.24	10.00			
332.19	82.50			15	5,382.77–S
5.00	25.00			17	5,352.77–S
125.00	9.95			18	5,217.82–S
3,535.00				19	1,682.82–S
9.76				21	1,673.06–S
8.00				24	1,665.06–S
64.70				26	1,600.36–S
2.50	25.00			27	1,572.86–S

[fol. 73] PLAINTIFF'S EXHIBIT No. 6

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel,
Winston-Salem, N. C.

Statement for
the month of
May 1939
Winston-Salem

Copy

Checks Paid		Deposit	Date	Balance
	Balance from last statement		April 31	1,572.86
1.03	4.00	9.36	1	1,556.97-S
1.50				
5.00	72.54		2	1,479.43-S
2.61			3	1,476.82-S
19.60	14.72		4	1,442.50-S
30.00			5	1,412.50-S
20.00	5.00		6	1,387.50-S
3.00			8	1,384.50-S
10.00	15.00		9	1,359.50-S
23.50	25.00	5.95	11	1,305.05-S
2.60			13	1,302.45-S
6.00			15	1,296.45-S
31.75			16	1,264.70-S
5.00			18	1,259.70-S
73.79	8.00		22	1,177.91-S
4.80	40.00		25	1,133.11-S
25.00			27	1,108.11-S
5.00	3.00		29	1,100.11-S

[fol. 74] PLAINTIFF'S EXHIBIT No. 7

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel,
Winston-Salem, N. C.

Statement for
the month of
June 1939
Winston-Salem

Copy

Checks Paid		Deposit	Date	Balance
	Balance from last statement		May 31	1,100.11
50.00			31	1,050.11–S
3.00	5.98	3.35	1	1,037.78–S
8.95			2	1,028.83–S
10.00	3.60	5.00	3	1,010.83–S
2.00E			7	1,008.83–S
38.50	101.78	20.52	8	848.03–S
10.00			10	838.03–S
25.00			14	813.03–S
7.00			16	806.03–S
59.00	3.00		19	744.03–S
36.00			20	708.03–S
25.00			22	683.03–S
10.00	12.00		24	661.03–S
100.00			26	561.03–S
25.00			28	536.03–S

[fol. 75] PLAINTIFF'S EXHIBIT No. 8

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
July 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement June 31				536.03
50.00	16.05		80.67	30	550.65–S
55.00	12.00	3.50		1	480.15–S
5.27				5	474.88–S
5.50				6	469.38–S
22.21				7	447.17–S
3.00	2.28	25.00		8	416.29–S
.40	50.36			10	365.53–S
9.23	13.00			11	343.30–S
13.95					
2.88	161.82		200.00		
			1000.00	12	1,364.65–S
3.35	2.88	22.50		13	1,335.92–S
50.00				14	1,285.92–S
8.00				15	1,277.92–S
42.50	2.00			17	1,233.42–S
25.00				19	1,208.42–S
55.00				21	1,153.42–S
20.45				24	1,132.97–S
2.88				26	1,130.09–S
51.00	50.00			28	1,029.09–S
12.90	25.00			29	991.19–S

[fol. 76] PLAINTIFF'S EXHIBIT No. 9

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
August 1939
Winston-Salem

Copy

Checks Paid		Deposits		Date	Balance
	Balance from last statement July 31				991.19
50.00				1	941.19–S
38.65	18.33			2	884.21–S
22.26	12.40			3	849.55–S
8.88				4	840.67–S
5.00				5	835.67–S
24.00	25.00			7	786.67–S
1.00SC				11	785.67–S
25.41	25.00	10.00		12	725.26–S
4.95	16.84	1000.00	2,714.02	14	2,417.49–S
1000.00				15	1,417.49–S
500.00				16	917.49–S
35.00				17	882.49–S
50.00	25.00	4.00		21	803.49–S
25.00	5.00			25	773.49–S
2.00				26	771.49–S
10.00	25.00			28	736.49–S
22.55	55.00			29	658.94–S

[fol. 77] PLAINTIFF'S EXHIBIT No. 10

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
September 1939
Winston-Salem

Checks Paid		Deposits	Date	Balance
	Balance from last statement August 31			658.94
3.61	43.36		1	611.97–S
1.50			5	610.47–S
18.66			7	591.81–S
6.00			9	585.81–S
23.90			12	561.91–S
11.00			15	550.91–S
350.00			22	200.91–S
16.55			23	184.36–S
10.00			26	174.36–S

[Fol. 78] PLAINTIFF'S EXHIBIT No. 11

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone, and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
October 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
Balance from last statement September 31					174.36
10.00				2	164.36-S
49.49			1,000.00	3	1,114.87-S
1.94	18.23			4	1,094.70-S
5.00	65.00		60.00	5	1,084.70-S
4.70	41.00	10.00			
14.22	5.65			6	1,009.13-S
15.00				7	994.13-S
2.00	7.65			9	984.48-S
35.46				11	949.02-S
33.76	3.50	200.00		13	711.76-S
106.51				14	605.25-S
			189.45	18	794.70-S
2.00				19	792.70-S
10.00				23	782.70-S
78.20				25	704.50-S
11.33			100.00		
			316.00	27	1,109.17-S
4.20	5.00			30	1,099.97-S

[fol. 79] PLAINTIFF'S EXHIBIT No. 12

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
November 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
	Balance from last statement October 31				1,099.97
2.96				1	1,097.01–S
35.00				2	1,062.01–S
25.79				3	1,036.22–S
7.31	3.00	6.24		4	1,019.67–S
2250.00	10.00	10.28			
6.25			2,300.00	6	1,043.14–S
26.00	97.15	13.67		7	906.32–S
35.25				8	871.07–S
8.19				9	862.88–S
466.00	225.00			10	171.88–S
5.00	25.00			13	141.88–S
			1,000.00	15	1,141.88–S
50.00				17	1,091.88–S
25.00	10.00			20	1,056.88–S
30.00				25	1,026.88–S
10.00	25.00			27	991.88–S
10.61				28	981.27–S

[fol. 80] PLAINTIFF'S EXHIBIT No. 13

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
December 1939
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
Balance from last statement November 29					981.27
8.25				1	973.02–S
100.00				4	873.02–S
5.12				5	867.90–S
15.00				7	852.90–S
7.55				8	845.35–S
46.13	5.00	1.24		12	792.98–S
5.71	8.26	13.40			
11.44				14	754.17–S
6.00				15	748.17–S
6.10			25,100.00	16	25,842.07–S
10.00			300.00	18	26,132.07–S
.63E	15,000.00			19	11,131.44–S
5000.00	3.00			20	6,128.44–S
5000.00				22	1,128.44–S
			200.30	26	1,328.74–S

[fol. 81] PLAINTIFF'S EXHIBIT No. 14

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
January 1940
Winston-Salem

Copy

Checks Paid			Deposits	Date	Balance
Balance from last statement December 30					1,328.74
21.80				30	1,306.94–S
3.00	41.23	10.00		2	1,252.71–S
206.30				3	1,046.41–S
42.65	8.03			4	995.73–S
27.29	6.08			5	962.36–S
10.69	4.12			6	947.55–S
10.00				8	937.55–S
10.00			680.00	10	1,607.55–S
15.00	10.00			11	1,582.55–S
25.00	4.55	8.60		12	1,544.40–S
.50E	11.01			13	1,532.89–S
10.00			2000.00	15	3,522.89–S
3000.00	3.00			16	519.89–S
2.97TX				16	516.92–S
5.00	25.00			17	486.92–S
			322.00	20	808.92–S
25.00				22	783.92–S
500.00				23	283.92–S
1.41	10.00	20.00		27	252.51–S
50.00	10.00			29	192.51–S

[fol. 82] PLAINTIFF'S EXHIBIT No. 15

To Deposition of G. M. Alspaugh

In Account with Wachovia Bank & Trust Company, North Carolina

Mr. Daniel F. Boone and/or
Mrs. Martha Lightner Boone
c/o Robert E. Lee Hotel
Winston-Salem, N. C.

Statement for
the month of
February 1940
Winston-Salem

Copy

Checks Paid	Deposits	Date	Balance
	Balance from last statement	January 31	192.51
192.51		5	.00-S

Cross-examination:

The ledger sheets produced do not include the account during its entire period with the bank. The account existed prior to the date of the first exhibit. It was not continued after the last date shown there. It was closed on February 5, 1940. I believe it was. The last statement here shows it. It was closed on the 5th day of February 1940, that is where it ceased. It was opened in 1938, I believe; I am not positive about the correct date on that. The account is headed:

"Mr. Daniel F. Boone and/or Mrs. Martha Lightner Boone"

and the bank honored checks drawn by either of these persons on the account.

The plaintiffs offered in evidence the Deposition of David S. Patterson, marked Plaintiffs' Exhibit C, which deposition reads as follows:

[fol. 83] PLAINTIFFS' EXHIBIT C

DEPOSITION OF DAVID S. PATTERSON

David S. Patterson testified as follows: I am David S. Patterson living at 126 DeHart Place, Elizabeth, New Jersey. I am an accountant. I am employed by Merrill, Lynch, Pierce, Fenner & Beane, as Chief Accountant. I am familiar with all of the records of my employers. The firm

of Merrill, Lynch, Pierce, Fenner & Beane is a consolidation of other brokerage houses, they are stock brokers and members of the New York Stock Exchange. E. A. Pearce & Company, Merrill, Lynch, Cassatt & Company, Fenner & Beane, Fuller Rodney & Company were consolidated to create the present firm of Merrill, Lynch, Pierce, Fenner & Beane.

I am familiar with the account of Daniel F. Boone. I will produce all of the accounts of Daniel F. Boone with my company from December 7, 1938, to date. The twenty pages you show me are photostatic copies of the original ledger in the firm of Merrill, Lynch, Pierce, Fenner & Beane from March 7, 1939, to August 29, 1941. This account was closed August 8, 1941. The address is changed on this account—on the statement for November 1940, to General Delivery, Washington, D. C., and on the December statement it was changed again to Capital Towers, 208 Massachusetts Avenue, N. W., Washington, D. C. The number 81,324,172 is only descriptive of the account in the period, because from time to time we change the numbers of our accounts. The twenty pages are true copies of the ledger of E. A. Pearce & Company and its successors, Merrill, Lynch, E. A. Pearce & Company, Fenner & Beane, Cassatt & Company. The record shows the continuing firm of E. A. Pearce & Company and all accounts in the merger from the time of this merger. We do not take over old records of any merged firm; they remain with the liquidating firm. The twenty pages represent copies of the account of Daniel F. Boone with E. A. Pearce & Company. These records were kept in the regular course of business.

[fol. 84] Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 were marked for identification.

Plaintiff offered said exhibits in evidence, as follows:

EXHIBIT A-1

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston-Salem, N. C.

March 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
100		Curtiss Wright	7	6½	660.00		
100		United Gas Improvement	7	13	1,314.00		
		Check	7	JE		3,498.00	
100		Greyhound New 1936	8	20⅛	2,102.50		
100		Pennsylvania RR	8	22⅞	2,302.50		
100		Western Union Tel	8	23½	2,365.00		
100		Glenn L. Martin Com	9	36	3,616.00		
		Check	9	JE		2,313.00	
100		Republic Steel	10	21½	2,165.00		
		Interest at 3¾%	27		13.94		
		Security Position					8,727.94*
100		Curtiss Wright					
100		Greyhound New 1936					
100		Glenn L. Martin Com					
100		Pennsylvania RR					
100		Republic Steel					
100		United Gas Improvement					
100		Western Union Telegraph					

[fol. 85]

EXHIBIT A-2

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.
April 1939

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston-Salem, N. C.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance March 31st			8,727.94		
		100 Greyhound Corp	1	Div		20.00	
500		Packard Motor Car	4	3⅓	1,785.00		
		Check	4	JE		1,300.00	
		Check	11	JE		1,100.00	
100		Chesapeake & Ohio	18	32	3,216.00		
100		Greyhound New 1936	18	17⅛	1,726.50		
100		R J Reynolds Tob Co B	18	38¼	3,891.00		
		Check	19	JE		3,535.00	
		Interest at 3¼%	26		31.33		
		Security Position					13,422.77*
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		United Gas Improvement					
100		Western Union Telegraph					

[fol. 86]

EXHIBIT A-3

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
Robert E. Lee Hotel,
Winston Salem, N. C.

May 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance April 30th			13,422.77		
		Check	5	JE	520.51		
		Mailing Charge	5		.22		
5		General Motors Corp	5	Rec			
10		Greyhound New 1936	5	Rec			
25		The Aviation Corp N	5	Rec			
		5 General Mot Corp	8	44		214.74	
	10	Greyhound New 1936	8	18		174.29	
	25	The Aviation Corp N	8	5½		131.70	
		100 Reynolds Tob B	15	Div		50.00	
		Check	16		50.00		
		Interest at 3¾%	26		42.09		
		Security Position					13,464.86
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		United Gas Improvement					
100		Western Union Telegraph					

[fol. 87]

EXHIBIT A-4

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

June 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance May 31st			13,464.86		
		Interest at 3¾%	27		43.47		
		Check	30		25.00		
		100 United Gas Imp	30	Div		25.00	
		Security Position					13,508.33*
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		United Gas Improvement					
100		Western Union Telegraph					

75

[fol. 88]

EXHIBIT A-5

WS 81324

172

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.
July 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance June 30th					
		Check	3		13,308.33		
		200 Greyhound Corp	3	Div	90.00		
		100 Ches & Ohio	3	Div		40.00	
100		Southern Pacific	25	15⅜	1,551.50	50.00	
		Interest at 3¾%	26		42.20		
	100	United Gas Improvement	28	13½		1,328.97	
		Security Position					13,773.06*
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
500		Packard Motor Car					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		Western Union Telegraph					

[fol. 89]

EXHIBIT A-6

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.
August 1939

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance July 31st			13,773.06		
100		Natl Dairy Com	7	18	1,814.00		
100		Paramount Pictures	7	10	1,014.00		
100		Timken Detroit Axle	7	14⅞	1,501.50		
		CLeck	7	JE		1,000.00	
		Check	15	JE	50.00		
		100 Reynolds Tob B	15	Div		50.00	
		Interest at 3¾%	28		50.75		
		Security Position					17,153.31 Dr.
100		Chesapeake & Ohio					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L Martin Com					
100		Natl Dairy Com					
500		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Republic Steel					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		Timken Detroit Axle					
100		Western Union Telegraph					

77

[fol. 91]

EXHIBIT A-8

WS 81324

172

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Aug 31 1940
to Sep 27 1940

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston-Salem, N. C.
No. 2 Acct.

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance August 30th			11,038.44		
		100 Otis Elevator	20	Div		25.00	
		Int to 9-21 3¾%	24		32.17		
							11,045.61 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 92]

EXHIBIT A–9

80

WS 81324

172

Mr. Daniel F. Boone
Robert E. Lee Hotel
Winston Salem, N. C.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Sep 28 1940
to Oct 25 940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Sept 27th			11,045.61		
		Check 9 30	1		25.00		
		200 Greyhound Corp	1	Div		50.00	
		100 Paramount	1	Div		15.00	
		100 Natl Dairy	1	Div		20.00	
	100	Pennsylvania RR	4	23¼		2,302.95	
		Check 10 3	4		1,400.00		
		Int to 10 19 3¾%	23		30.68		
							10,113.34
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Southern Pacific					

[fol. 93]

EXHIBIT A-10

698

81324

157

Capt Daniel F. Boone
c/o General Delivery
Washington, D. C.

No. 2 Acct.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Oct 26 1940
to Nov 29 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance October 25th			10,113.34		
		Check 10-28	29		85.00		
		Int to 11-13 3/3/4%	13		25.41		
	100	Baldwin Locomotive	13	JE		10,223.75	
	500	Curtiss Wright	13	JE			
	100	Natl Dairy Com	13	JE			
	200	Greyhound Corp 1936	13	JE			
	100	Natl Gypsum $1 Par	13	JE			
	200	North Amer Aviation	13	JE			
	100	Otis Elevator	13	JE			
	100	Packard Motor Car	13	JE			
	100	Paramount Pictures	13	JE			
	100	Southern Pacific	13	JE			
		T FO to Wash Office	13				0.00

81

[fol. 94]

WD 34342

EXHIBIT A-11

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Oct 26 1940
to Nov 29 1940

Customer's No. 34342

Mr. Daniel F. Boone
c/o General Delivery
Washington, D. C.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
100		Baldwin Locomotive	13	JE	10,223.75		
500		Curtiss Wright	13	JE			
200		Greyhound Corp 1936	13	JE			
100		Natl Dairy Con	13	JE			
100		Natl Gypsum $1 Par	13	JE			
200		North Amer Aviation	13	JE			
100		Otis Elevator	13	JE			
100		Packard Motor Car	13	JE			
100		Paramount Pictures	13	JE			
100		Southern Pacific	13	JE			
		TFO FRM Winston-Salem	13				
100		Pennsylvania RR	13	25⅛	2,552.50		
	100	Pennsylvania RR	14	25		2,477.95	
		Check 11 19	20		500.00		
		Int to 11 23 3¾%	27		11.14		
							10,809.44 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Paramount Pictures					
100		Southern Pacific					

[fol. 95]

EXHIBIT A-12

WD 34342

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Nov 30 1940
to Jan 3 1941

Capt. Daniel F. Boone
Capitol Towers
208 Massachusetts Ave., N. W.
Washington, D. C.

Customer's No. 34242

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Nov 29th			10,809.44		
		500 Curtiss Wright	14	Div		250.00	
		100 Natl Dairy Prod	16	Div		20.00	
		Check 12 16	17		250.00		
		100 Otis Elevator	20	Div		40.00	
		Check 12 19	20		20.00		
		Check 12 21	23		40.00		
		100 Paramount Pic	24	Div		15.00	
		200 No Amer Aviation	24	Div		150.00	
		100 Natl Gypsum	26	Div		40.00	
		200 Greyhound Corp	26	Div		90.00	
		Check 12 26	27		200.00		
		Check 12 27	28		130.00		
		Int to 12 28 3¼%			39.16		
							10,883.60 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Southern Pacific					

[fol. 96]

EXHIBIT A–13

WD 34342

Capt. Daniel F. Boone
Capital Towers
208 Massachusetts Ave., N. W.
Washington, D. C.

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Jan 4 1941
to Jan 31 1941

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance January 3rd			10,893.60		
		Check 1 4	6		433.00		
	100	Paramount Pictures	7	11		1,082.92	
		Int to 1 25 2½%	28		20.35		
							10,254.03 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Southern Pacific					

[fol. 97]

EXHIBIT A-14

WD 34342

157

Ledger
In Account with Merrill Lynch
E. A. Pierce & Cassatt, New York
From Feb 1 1941

Capt. Daniel F. Boone
Capital Towers
208 Massachusetts Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Jan 31st			10,254.03		
		Int. to 2 22 2½%	16		19.93		
							10,273.96 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Southern Pacific					

[fol. 98]

EXHIBIT A-15

WD 34-342

157

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Mar 1 1941
to Mar 28 1941

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Feb 28th					
					10,263.96		
		100 Otis Elevator	20	Div		20.00	
		Check 3 20	21		20.00		
		Int to 3 22 2½%	25		19.97		
							10,293.93 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Southern Pacific					

[fol 99]

EXHIBIT A-16

WD 34-342

156

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From March 29 1941
to April 25 1941

Capt. Daniel F. Boone
Capital Towers
206 Mass. Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance March 26th			10,293.93		
		100 Natl Dairy Prod	1	Div		20.00	
		200 Greyhound Corp	1	Div		50.00	
		Check 4 2	3		70.00		
	100	Natl Dairy Com	8	13¼		1,302.97	
	100	Natl Gypsum $1 Par	8	7⅓		698.43	
	100	Otis Elevator	8	16		1,577.96	
	100	Southern Pacific	8	11		1,077.97	
		Int to 4 19 2½%	22		17.90		
		Check 4 23	24			800.00	
							6,714.59 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

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[fol. 100] EXHIBIT A-17

WD 34-342

156

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From Apr 26 1941
to May 30 1941

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance April 25th			6,714.59		
		Int to 5 24 2½%	27		16.59		
							6,731.18 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

[fol. 101]

EXHIBIT A-18

WD 34-342

156

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
From May 31 1941
to Jun 27 1941

Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance May 30th			6,731.18		
		6 24 to 6 21 2½%	24	Int	13.08		
							6,744.26 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

[fol. 102]

EXHIBIT A-19

90

WD 34-342

156

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Ledger
Statement of Account with
Merrill Lynch, E. A. Pierce & Cassatt
70 Pine Street, New York
From June 28 1941
to July 25 1941
Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance June 27th			6,744.26		
		200 Greyhound Corp	1	Div		50.00	
		Int to 7-16 2½%	14		11.65		
		Check 7-18	19		75.00		
5M		Fed Land Bk 3 56 JJ	19	Rec			
	5M	Fed Land Bk 3 56 JJ	22	109¼		5,471.25	
		Ck 7 1 41 Int on 5M	23			75.00	
		Consol Fed Land Bk	23				
		3 36 56	23				
		Int to 7 18 2½%	24		1.40		
							1,236.06 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
200		North Amer Aviation					
100		Packard Motor Car					

[fol. 103]

EXHIBIT A-20

WD 34-342

156

Capt. Daniel F. Boone
Capital Towers
208 Mass. Ave., N. W.
Washington, D. C.

Ledger
Statement of Account with
Merrill Lynch, Pierce, Fenner & Beane
70 Pine Street, New York
From July 26 1941
to Aug 29 1941
Customer's No. 34342

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance July 25th			1,336.06		
		Check 7 25	26			198.89	
		Check 7 25	26			412.92	
100		Natl Gypsum $1 Par	26	Rec			
	500	Curtiss Wright	29	JE			
	200	North Amer Aviation	29	JE			
	100	Baldwin Locomotive	29	JE-			
		Int to 8 1 at 2½%	1		3.81		
	100	Packard Motor Car	1	Del			
		Check 8 1	2		57.87		
	100	Natl Gypsum $1 Par	5	7		685.93	
	200	Greyhound Corp 1936	8	JE			
							0.00

91

At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibits, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes Defendant's Exception No. 3.

The twelve photostatic sheets you hand me are copies of the original ledger account of E. A. Pierce & Company and continuing firms with Daniel F. Boone No. 2 Account. They were made in the regular course of business of E. A. Pierce & Company and continuing firms.

Exhibits B-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 were marked for identification and offered in evidence by plaintiff, as follows:

[fol. 104]

EXHIBIT B-1

WS 81324

172

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
No. 2 Acct.

September 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance August 31st			17,153.31		
	100	Republic Steel	7	26¾		2,650.94	
	100	Chesapeake & Ohio	8	37		3,678.67	
		Check	8	JE	2,850.00		
	100	Western Union Tel	12	27		2,675.94	
		Check	20		25.00		
		100 Timken Det Axle	20	Div		25.00	
100		Packard Motor Car	22	Rec			
		Check	23	JE	750.00		
		Int at 3¾%	26		46.05		
		Security Position					11,793.81 Dr.
100		Curtiss Wright					
200		Greyhound New 1936					
100		Glenn L. Martin Com					
100		Natl Dairy Com					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		Timken Detroit Axle					

[fol. 105]

EXHIBIT B-2

WS 81324

172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with E. A. Pierce & Co.
40 Wall Street
New York, N. Y.

October 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Sept 30th			11,793.81		
		Check	2		60.00		
		200 Greyhound Corp	2	Div		40.00	
		100 Natl Dairy Prod	2	Div		20.00	
100		Baldwin Loco New	19	20½	2,065.00		
	100	Timken Detroit Axle	19	20		1,980.46	
	100	Glenn L Martin Com	27	41⅛		4,141.36	
		Int at 3¾%	27		36.89		
		Security Position					
100		Baldwin Loco New					
100		Curtiss Wright					
200		Greyhound New 1936					
100		Natl Dairy Com					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					

7,773.88 Dr.

[fol. 106]

EXHIBIT B-3

WS 81324

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
No. 2 Acct.

November 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance October 31st			7,773.88		
		Check	6	JE		2,250.00	
	100	Curtiss Wright	8	11¾		1,157.93	
300		Curtiss Wright	8	10½	3,192.00		
400		Curtiss Wright	8	10½	2,128.00		
200		North Amer Aviation	8	27⅜	5,555.00		
100		United Aircraft	8	47	4,717.00		
100		Natl Gypsum $1 Par	10	11½	1,164.00		
100		Otis Elevator New	10	18	1,814.00		
		Check	10	JE		466.00	
		Check	15		50.00		
		100 Reynolds Tob B	15	Div		50.00	
		Interest at 3¾%	27		49.88		
		Security Position					22,519.83 Dr.
100		Baldwin Loco New					
500		Curtiss Wright					
200		Greyhound New 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator New					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		United Aircraft					

[fol. 107]

EXHIBIT B–4

WS 81324

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

November 1939

Mr. Daniel F. Boone,
No. 2 Acct.

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Nov. 30th			22,519.83		
		Currency	4	JE		1,500.00	
100		Western Union Tel	5	25	2,515.00		
		Check	15		345.00		
		200 North Amer Avia	15	Div		200.00	
		100 Natl Dairy Prod	15	Div		20.00	
		100 United Aircraft	15	Div		125.00	
		Check			100.00		
		100 Pennsylvania RR	18	Div		100.00	
		Check	20		35.00		
		100 Otis Elevator	20	Div		35.00	
		Check	21		150.00		
		200 Greyhound Corp	21	Div		150.00	
		Check	22		25.00		
		100 Natl Gypsum	22			25.00	
		Check	26		30.00		
		100 Reynolds Tob B	26	Div		30.00	
		Int to 12 24 3¾	27		72.21		
		Security Position					23,607.04 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					

[fol. 108]

EXHIBIT B–5

WS 81324

172

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

Mr. Daniel F. Boone
No. 2 Acct.

December 1939

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
100		Pennsylvania RR					
100		R J Reynolds Tob B					
100		Southern Pacific					
100		United Aircraft					
100		Western Union Telegraph					

[fol. 109]

EXHIBIT B-6

WS 81324
172

Ledger
in Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

January 1940

Mr. Daniel F. Boone

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Dec 31st			23,607.04		
	100	Western Union Tel	4	28		2,775.94	
		Check	4	JE	680.00		
		Check	19	JE	300.00		
	100	R J Reynolds Tob B	23	41¼		4,103.41	
		Int to 1 24 3¾%	29		71.57		
		Security Position					17,779.26 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					
100		United Aircraft					

[fol. 110]

EXHIBIT B-7

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with E. A. Pierce & Company
40 Wall Street
New York, N. Y.

February 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Jan 31st			17,779.26		
		Int to 2 24 3¾%	27		57.37		
		Security Position					17,836.63 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					
100		United Aircraft					

[fol. 111]

EXHIBIT B-8

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with E. A. Pierce &Company
40 Wall Street
New York, N. Y.

March 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance Feb 29th			17,836.63		
		Check	20		15.00		
		100 Otis Elevator	20	Div		15.00	
		Int to 3-24 3¼%	27		53.86		
		Security Position					17,890.49 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					
100		United Aircraft					

[fol. 112]

EXHIBIT B–9

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with Merrill Lynch,
E. A. Pierce & Cassatt, New York
April 1940
Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance March 31st			17,890.49		
		100 Natl Dairy Prod	1	Div		20.00	
		200 Grayhound Corp	1	Div		50.00	
		Check	2		70.00		
	100	United Aircraft	17	51½		5,127.64	
		Check 4–16	17		2,100.00		
		Int to 4–24 3¾%	24		55.54		
		Security Position					14,918.39 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 113]

EXHIBIT B-10

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with
Merrill Lynch, E. A. Pierce & Cassatt
New York

May 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance April 30th			14,918.39		
		Check	1	16		1,050.00	
		Int to 5-25 3¾%	28		45.74		
		Check	29			1,900.00	
		Security Position					12,014.13 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
600		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 114]

EXHIBIT B-11

WS 81324
172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with
Merrill Lynch, E. A. Pierce & Cassatt
New York

June 28, 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance May 31st			12,014.13		
		Check	6		721.00		
	500	Packard Motor Car	10	3¾		1,804.96	
		Check	20		20.00		
		100 Otis Elevator	20	Div		20.00	
		Int to 6-22 3¾%	25		36.21		
		Check	26		50.00		
		100 Penn RR	26	Div		50.00	
							10,966.38 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 115–134]

EXHIBIT B–12

WS 81324

172

Mr. Daniel F. Boone
No. 2 Acct.

Ledger
In Account with
Merrill Lynch, E. A. Pierce & Cassatt
New York
From June 29 1940
to July 26 1940

Customer's No. 81324

Bought or Rec'd	Sold or Del'd	Description	Day	Price	Debit	Credit	Balance
		Balance June 28th					
		Check	1		10,966.38		
		200 Greyhound Corp	1	Div	185.00		
		200 North Amer Avia	1	Div		50.00	
		100 National Dairy Prod	1	Div		100.00	
		100 Paramount Picts	1	Div		20.00	
		Int to 7-20 3¾%	23		31.97	15.00	
							10,998.35 Dr.
100		Baldwin Locomotive					
500		Curtiss Wright					
200		Greyhound Corp 1936					
100		Natl Dairy Com					
100		Natl Gypsum $1 Par					
200		North Amer Aviation					
100		Otis Elevator					
100		Packard Motor Car					
100		Paramount Pictures					
100		Pennsylvania RR					
100		Southern Pacific					

[fol. 135] At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibits but entered no exception thereto and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes Defendant's Exception No. 5.

For the dates stated, these represent all of the accounts of Daniel F. Boone with the firm of E. A. Pierce and successor companies. I can identify the check drawn on Wachovia Bank & Trust Company, Winston-Salem, N. C., on the account of Daniel F. Boone #1842, dated March 6, 1939, for the sum of $3498.00, payable to E. A. Pierce & Company. The check was credited to the account of Daniel F. Boone, WS-81324 (Exhibit A-1) on March 7, 1939.

This check was marked Exhibit E for identification.

The check drawn on Wachovia Bank & Trust Company, Winston-Salem, N. C., in the account of Daniel F. Boone, No. 1845, dated March 8, 1939, for the sum of $2313.00 payable to the order of E. A. Pierce & Company was credited to the account of Daniel F. Boone, WS 81234, on March 9, 1939.

This was marked Exhibit F for identification.

EXHIBIT "E"

Plaintiff Offered in evidence Exhibit E, as follows:

No. 1842

"Daniel F. Boone, Attorney at Law, Suite 110 Robert E. Lee Hotel, Winston-Salem, N. C.

March 6, 1939

Pay to the—E. A. Pierce Company—$3,498.00—Three Thousand Four Hundred Ninety Eight & x/100 Dollars. To Wachovia Bank & Trust Company, Winston-Salem, N. C.

(S.) Daniel F. Boone."

[fol. 136] At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 6.

EXHIBIT "F"

Plaintiff Offered in evidence Exhibit F, as follows:

No. 1845

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

March 8, 1939

Pay To The—E. A. Pierce & Co.—$2,313.00. Order of Two Thousand, Three Hundred Thirteen & x/100 Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

(S.) Daniel F. Boone."

At the taking of the deposition counsel for the defendant objected before the notary public to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 7.

The check you show me drawn on Wachovia Bank & Trust Company, Winston-Salem, N. C., No. 1899, dated April 10, 1939, Daniel F. Boone, Payor, E. A. Pierce Company, Payee, for the sum of $1100.00, was credited on the account of Daniel F. Boone, WS 81324, on April 11, 1939.

This check was marked Exhibit G for identification.

The check you show me on Wachovia Bank & Trust Company, Winston-Salem, No. 1911, to the order of E. A. Pierce & Company for the sum of $3535.00, D. F. Boone, Payor, [fol. 137] was credited to the account of D. F. Boone, WS 81324.

This check was marked Exhibit H, for identification.

I do not think this check you have shown me on Wachovia Bank & Trust Company, Winston-Salem, N. C., No. 2118, in the amount of $15,000.00, payable to the order of Cash, Daniel F. Boone, Payor, would be accepted drawn to Cash. I cannot find it in any of the exhibits.

This check was marked Exhibit I, for identification.

I cannot identify the check you show me in the amount of $5,000.00 on Wachovia Bank & Trust Company, Winston-Salem, N. C., dated December 22, 1939, No. 2123, drawn to the order of Cash, Daniel F. Boone, Payor.

This check was marked Exhibit J, for identification.

Plaintiff Offered in evidence Exhibit G, as follows:

EXHIBIT "G"

No. 1899

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

April 10, 1939

Pay to the
Order of—E. A. Pierce & Company $1,100.00—Eleven Hundred Only ..... Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

(S.) Daniel F. Boone."

At the taking of the deposition counsel for the defendant objected before the Notary Public to the introduction of [fol. 138] the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 8.

EXHIBIT "H"

Plaintiff Offered in evidence Exhibit H, as follows:

No. 1911

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel

Pay to the
Order of—E. A. Pierce & Company—$3535.00—Three Thousand Five Hundred and Thirty-Five and x/100—Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

Daniel F. Boone".

At the taking of the deposition counsel for the defendant objected before the notary public to the introduction of the

foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception No. 9.

Plaintiff Offered in evidence Exhibit I, as follows:

EXHIBIT "I"

No. 2118

"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel

Pay to the
Order of—Cash—$15,000—Fifteen Thousand and x/100—Dollars
To Wachovia Bank & Trust Company
Winston-Salem, N. C.

Daniel F. Boone."

[fol. 139] At the taking of the deposition counsel for the defendant objected, before the Notary Public, to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection, or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception #10.

Plaintiff offered in evidence *Exhibit J*, as follows:

EXHIBIT "J"

No. 2123
"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

December 22, 1939.

Pay to the order of Cash $5,000.00, Five Thousand and x/100 Dollars. To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

At the taking of the deposition counsel for the defendant objected, before the Notary Public, to the introduction of

the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes defendant's Exception #11.

Plaintiff offered in evidence *Exhibit K*, as follows:

EXHIBIT "K"

No. 2119
"Daniel F. Boone
Attorney at Law
Suite 110 Robert E. Lee Hotel
Winston-Salem, N. C.

12/20th, 1939.

Pay to the order of Cash $5,000.00, Five Thousand and x/100 Dollars. To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

[fol. 140] At the taking of the deposition, counsel for the defendant objected before the Notary Public to the introduction of the foregoing exhibit, but entered no exception thereto, and no objection or exception, of course, was made to the introduction of this evidence on the trial.

This constitutes Defendant's Exception #12.

Plaintiff's Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20,—and B-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,—and C-1, 2. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and D-1 and D-2 are copies of all of the accounts of E. A. Pierce & Company and continuing companies with Daniel F. Boone between December 7, 1938, and the present date.

Cross-Examination

Daniel F. Boone has no open account at the present time with the firm of Merrill, Lynch, Pierce, Fenner & Beane. He has no open account with E. A. Pierce because that has been merged into the present firm. When he closed these accounts out he paid all indebtedness he might have had existing to any of these companies. Fenner & Beane is in liquidation. We only searched the records of the accounts we took over from Fenner & Beane and we got no account from Fenner & Beane of Captain Boone.

The paper which you hand me, marked Defendant's Exhibit 1, is a letter from Merrell, Lynch, Pierce, Fenner & Beane, to Captain Daniel F. Boone.

Defendant offered in evidence *Exhibit 1,* as follows:

[fol. 141] DEFENDANT'S EXHIBIT 1

Merrill, Lynch, Pierce, Fenner & Beane,
Seventy Pine Street, New York

November 3, 1941.

Captain Daniel F. Boone, 7936 16th St., N. W., Washington, D. C.

DEAR SIR:

Our records indicate the following purchases for your accounts:

Shs	Name of Security	Purchased for Account of	Date of Purchase	Price	Net Cost
500	Curtis Wright	Daniel F. Boone	11-8-39	10½	$4,320.00
200	North Amer Avia	" #2 acct.	"	27⅝	5,555.00
100	Baldwin Loco New	" "	10-19-39	20½	2,065.00
100	Greyhound Bus, New	Daniel F. Boone Acct.	3-8-39	20⅞	2,102.50

Our records indicate that all of the above securities have been paid for in full and were delivered to you.

Very truly yours, Merrill, Lynch, Pierce, Fenner & Beane, By D. S. Patterson.

DSP:EWC.

[fol. 142] Prior to argument of the case by counsel for the plaintiffs, the Court made the folowing statement to the jury:

"Gentlemen, if you would like you may make such memoranda with pencil and paper that you would like to make, jotting down any figures, and you would be entitled to use these exhibits which are offered in evidence here in the court, but you cannot take them into the jury room without the defendant's consent, and the defendant, having no one here to give defendant's consent, the Court instructs you that you may make any notations you would like here in the court room."

The case was then argued to the jury by Messrs. J. E. Shipman and M. R. McCown, attorneys for the plaintiffs, issues being submitted to the jury as appear in the record.

In Superior Court of Henderson County

Judge's Charge

Gentlemen of the Jury, the plaintiffs, in the case of Clarence M. Lightner, Theodore A. Lightner, Mrs. Alice Lightner Hopf, Mrs. Martha Lightner Boone, and Martha Penelope Boone, a minor, against Daniel F. Boone, Trustee for Martha Penelope Boone, a minor, have brought an action alleging that the defendant, Daniel F. Boone, is in fact the trustee of the minor, Martha Penelope Boone.

The defendant admits that he is the trustee for his minor daughter, but the first issue submitted to you—(and the Court is not going to review the testimony, without objection) the first issue submitted to you: "Is the defendant, Daniel F. Boone, a trustee of the fund of $15,449.10 referred to in the complaint and answer?" carries with it the burden upon the plaintiff to satisfy you by the greater weight of the evidence not alone that he is the trustee, but as to this amourt, which the plaintiffs insist that you should so find by the greater weight of the evidence.

[fol. 143] And when the Court tells you that the plaintiffs must satisfy you by the greater weight of the evidence, it means just what is says; all the evidence, the testimony and the documentary. The plaintiffs say there is no question as to he, Daniel F. Boone, being the trustee of this fund, for his minor daughter, Martha Penelope Boone. The defendant admits the trusteeship, but denies any agreement as to any specific fund.

Therefore, you will determine from all the evidence what the true facts are; and if you are so satisfied as to the first issue, and so satisfied by the greater weight of the evidence, as the plaintiffs insist you should be, then answer it YES; if you fail to be so satisfied, as the defendant insists you should be, then it will be your duty to answer it NO.

The second issue reads as follows: "If so, is the said fund subject to the same terms and provisions set forth in the Will of Frances M. Lightner for the management and control of the trust fund for the other three Lightner grand-children, as alleged in the complaint?"

Now, Gentlemen, the plaintiffs in this action contend there is a trust fund; that that trust fund by agreement was to be managed in the same manner that another trust fund was managed in the provisions of Mrs. Daniel F. Boone's mother's will, the Will which was read to you.

As you will recall its provisions provide for three men to act as counsellors, and to determine how best to expend the $40,000 trust fund provided in Mrs. Frances M. Lightner's will for her three grand-children then born. There was no provision in this will for any unborn grand-children.

The plaintiffs insist that after the death of Mrs. Frances M. Lightner, the mother of Mrs. Boone, it was suggested to Mr. Lightner, Mrs. Boone's father, who had been provided for in the will of his wife also, that Mrs. Boone was ap- [fol. 144] proaching confinement, and would give birth to a fourth grandchild within the near future, and that he might like to make some provisions for the fourth grandchild then unborn. Then after some discussion with respect thereto he stated that it was his desire to do so, that while the $40,000 fund was intended to provide for four grand-children yet it only provided for just three; that while it actually provided for three it made an amount shortly of $15,000 each. And then Mr. Lightner agreed that two insurance policies on his life should be so modified as to provide for the payment to his daughter, Mrs. Daniel F. Boone, from which fund, or rather which fund should be set up as a trust to provide for the care and education of the then unborn child of Mrs. Boone and her husband, Daniel F. Boone.

The plaintiff, Mrs. Boone, insists that at the time it was discussed it was within the contemplation of her father, herself and her husband, that the same parties should determine the manner of its expenditure and its handling as was provided in the will of the beneficiary's wife, Mrs. Frances M. Lightner; that with that distinct understanding, after her father's death, and after the birth of her child, the plaintiffs contend that Mrs. Boone received in two checks, as the beneficiary of the insurance policies upon her father's life, the sum of $15,449.10; that the two checks in question were executed to her and that she endorsed them over to her husband, with the distinct understanding, the plaintiffs contend, that they were to go into the setting up of a trust fund to be administered as heretofore stated.

The plaintiff, Mrs. Daniel Boone, insists that the paper writing at that time referred to in the sixth issue had never been heard of by Mrs. Boone; that it could not have been within the contemplation of the parties at that time, the

time the trust fund was established, for that Mrs. Boone had [fol. 145] neither seen nor heard of it, and that in truth and fact it didn't exist.

The plaintiffs ask you to answer the second issue YES, and the burden is upon the plaintiffs relating to the second issue, and if you are so satisfied answer it YES, and if you are not so satisfied, remembering that there is no burden on the defendant, answer it NO.

The Court refers you to the fact that the defendant is not here and his not being here does not remove the burden on the plaintiffs of bearing the greater weight of the evidence relating to such issues as the Court may submit to you. The defendant contends that there was a trust fund, but that he was to be the sole arbitrator, the sole trustee, and the sole determiner and manager of the said trust fund, without stint, hindrance or interference of any persons, relatives, or anyone whatever. You will recall that he admits he was the trustee, and is the trustee for his daughter, but he insists that he is the sole trustee for his daughter, and solely responsible therefor, and insists that you should answer the second issue NO.

The third issue is: "If so, has the defendant, as trustee, administered said trust fund as provided for in said will?"

(c) The burden is on the plaintiffs to satisfy you by the greater weight of the evidence on that issue as to their contentions relating thereto; and they say that from the defendant's own admissions he has not administered the said trust fund as provided for by the will of Frances M. Lightner, and they ask you, under all the evidence, to answer the third issue NO; IF YOU SHALL FAIL SO TO FIND, THEN YOU SHOULD ANSWER THE THIRD ISSUE YES. (d)

To the foregoing portion of the charge between the letters (c) and (d) the defendant excepts.

Exception No. 13.

[fol. 146] The words CAPITALIZED were not in the record of the charge as reported by the Court Reporter and were inserted by the Court of its own volition when the case was settled on appeal in the presence of counsel for plaintiffs and defendant. Defendant objected; overruled exception; the same not having been in plaintiffs' counter-case on appeal.

EXCEPTION NO. 14.

Now, Gentlemen, you will bear in mind on all the other issues except the third and fifth the plaintiffs insist you should answer yes, and on the third and fifth issues they ask you to answer the third no, and the fifth a sum of money.

The fourth issue is: "Has the defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?" However, Gentlemen, I am going to pass over this issue and refer to it later.

(e) The fifth issue is: "What amount, if any, has the defendant received as dividends and profits on said funds?"

The burden as to that issue is upon the plaintiffs to satisfy you by the greater weight of the evidence of their contentions relating thereto; and they insist that from all the evidence that you should find, and find by the greater weight thereof, that the defendant, Daniel F. Boone, has received on this account as dividends and profits the sum of $4,228.89, and that you should answer that issue, the fifth issue, in said amount; or if you fail to answer it in the said amount you should answer it in a substantial amount.

The burden is on the plaintiff to satisfy you on this issue, first that you should answer it in any amount, and second, what amount.

The defendant insists you should not answer it in any amount, on the contention that he wasn't required to give [fol. 147] any accounting whatever; that he has not accounted to any person, or Court, or anyone whatsoever. (f)

To the foregoing portion of the charge between the letters (e) and (f) the defendant excepts.

EXCEPTION NO. 15.

The sixth issue reads as follows: "Was Clarence A. Lightner, on October 11, 1938, without sufficient mental capacity to execute the paper writing alleged in defendant's answer, and copy thereof annexed thereto as defendant's Exhibit #1, as alleged in the plaintiffs' reply?"

The plaintiffs insist that Mr. Clarence Lightner, on the day of the execution of the paper writing, if he executed it, was not in sufficient mental condition, or hadn't sufficient mental capacity to execute such a paper writing.

Now, the question will arise immediately as to what sufficient mental capacity means—what mental capacity is required under such circumstances. The Court charges you that it is that degree of mental competence which en-

ables a man reasonably to understand and comprehend the nature and extent of his estate, the effect of his act, the natural objects of his bounty, and the natural calls of others upon his charitable sentiments; but that doesn't require that he be educated, or that he may have any vast understanding of these facts, but that he must reasonably appreciate what he is doing.

The plaintiffs insist that he was without such capacity on the date in question, and ask you to answer the sixth issue yes. Whereas, the defendant insists that he had sufficient mental capacity; that he wasn't without such capacity; that he knew what he was about; that he signed the paper in question and that at the time and place in question he knew what he was about and did so of his own volition, with full understanding and appreciation thereof, and asks you to answer the sixth issue no.

[fol. 148] Now Gentlemen, the paper writing alleged to have been signed by Clarence Lightner was offered in evidence by the plaintiffs; but with the stipulation that it was offered for the purpose of attack. In other words, the plaintiffs are attacking it, and not asserting it.

Now, Gentlemen, I will revert to the fourth issue, which reads: "Has said defendant failed to administer said trust fund as by law required of trustees, as alleged in the complaint?"

I wanted to read you the statute in this connection, but we do not seem able to lay our hands on it immediately. The Court charges you that as to this trustee, and to other trustees in North Carolina, he is required to make an accounting of his estate, to show what he has received, and show how he has expended it, and show how he has invested it and what profits he has received, if any. That is the protection the law clothes wards with.

The defendant insists that he wasn't required to make any report to anyone, or to any Court, and that he has not done so. He contends that his failure to do so was not for the purpose of evading the law and that he should not be prejudiced thereby, for that, he contends, he wasn't required to make such report, and that you should answer the fourth issue NO.

Whereas, the plaintiff insists that on the contrary the law requires him to make such report, and irrespective of the requirement of the law, this bequest should be admin-

istered similar to the one under the will of Mrs. Lightner, and that you should so find by the greater weight of the evidence and answer said issue YES.

Now, the burden is on the plaintiffs as to each and every one of the issues to satisfy you by the greater weight of the evidence of their contentions relative thereto.

[fol. 149] Gentlemen, Mrs. Boone has testified in behalf of the plaintiffs. She is the mother of Penelope Boone, the minor child. You will scrutinize her testimony in the light of her interest, giving it the same weight as you would otherwise to that of a disinterested witness if you find it's worthy of belief and truth.

You will also scrutinize the depositions that have been offered in evidence. A deposition is simply testimony taken in the absence of the jury and read to you in court.

Now, gentlemen, you have heard the evidence and you may make up your verdict as you find the facts warrant. You will bear in mind that the plaintiffs insist that you should answer all the issues YES, except the third and fifth; that you should answer the third NO, and the fifth, "$4,228.89" as the plaintiff's contend as to each issue.

Gentlemen, you may retire and make up your answers to these issues.

To the failure of the Judge to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon in accordance with Consolidated Statutes, Section 564, the defendant objects and excepts.

EXCEPTION NO. 16.

The jury thereupon returned the issues answered as appear in the record, and on Tuesday, May 26, 1942, the Court signed judgment as appears in the record. On Thursday, May 28, 1942, Mr. Cocke, of the firm of Williams & Cocke, appeared before the Court and the appeal entries which appear in the record were thereupon made. The defendant objected to the judgment and to the signing thereof on the said May 28, 1942, and excepted and appealed to the Supreme Court, moving to set the verdict aside, [fol. 150] which motion was overruled. Defendant excepted. To the failure of the Court to set the verdict aside, the defendant objected; overruled; exception.

EXCEPTION NO. 17.

The defendant excepted to the judgment and appealed to the Supreme Court of North Carolina.

EXCEPTION NO. 18.

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IN SUPERIOR COURT OF HENDERSON COUNTY

NOTICE

To Messrs. Williams & Cocke, Attorneys for Daniel F. Boone, Defendant:

You will please take notice that the plaintiffs, through their counsel, J. E. Shipman and McCown & Arledge, propose the foregoing as a counter-case, and this proposed counter-case is served pursuant to the applicable statutes.

This 16th day of July, 1942.

J. E. Shipman, McGown & Arledge, Attorneys for Plaintiffs.

Due and legal service of the foregoing counter-case is hereby accepted, this 16th day of July, 1942, and further service is waived.

Williams & Cocke, Attorneys for Defendant.

IN SUPERIOR COURT OF HENDERSON COUNTY

SETTLEMENT OF CASE BY THE JUDGE, JULY 28, 1942

In the presence of counsel for plaintiffs and defendant, pursuant to notice duly given, the foregoing is settled by the Court as the Case on Appeal to the Supreme Court.

Done at Chambers in Asheville, N. C., this July 28th, 1942.

H. Hoyle Sink, Judge.

IN SUPERIOR COURT OF HENDERSON COUNTY

ASSIGNMENTS OF ERROR

The defendant herewith groups his exceptions and assignments of error as follows:

1. The Superior Court erred in its order of February 2, [fol. 151] 1942, as set forth in EXCEPTION #1, denying

defendant's motion for continuance until after his service in the Army of the United States is terminated for that the Court failed to make a finding that the defense of the action by the defendant would not be hindered by his Military Service as provided by Section 201 of the Soldiers and Sailors Civil Relief Act, and in its discretion overruled the motion for continuance, and for other reasons, and in ordering a deposit of securities with the Clerk of Superior Court of Henderson County for that, among other reasons, the Court had no power to enter such an order as set forth in EXCEPTION #1 (R. p. 50).

2. The Superior Court erred in denying defendant's request for a continuance at the May-June, 1942, Term of the Superior Court of Henderson County as set forth in defendant's EXCEPTION #2, for that, among other reasons, the Court failed to make a finding that the defense of the action by the defendant would not be hindered by his Military Service as provided by Section 201 of the Soldiers and Sailors Civil Relief Act and in its discretion overruled the motion for a continuance. This constitutes assignment of error #2 (R. p. 60).

3. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in EXCEPTION #3 (R. p. 103), Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, set out below, for that the said exhibits were not material to the issues involved in the case and were prejudicial to the defendant, were not properly identified and were not the best evidence, and that the Court failed to pass upon the introduction of said exhibits at the time of the trial although an objection was made to the introduction of said exhibits at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 103):

[fol. 152-190] Exhibits A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 were marked for identification. Omitted, printed side page, 84 ante.

[fol. 191] This constitutes Assignment of Error No. 5.

6. The Superior Court erred in allowing into the evidence over the objection of the defendant, as set out in Exception No. 6, Exhibit E, set out below, for that the said Exhibit was not material to the issues involved in the case and was

prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 136.)

No. 1842

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

March 6, 1939.

Pay to the order of E. A. Pierce Co., $3,498.00—Three Thousand Four Hundred Ninety Eight & x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 6.

7. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 7, Exhibit F, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial, although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 136):

[fol. 192]

No. 1845

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

March 8, 1939.

Pay to the order of E. A. Pierce & Co., $2,313.00—Two Thousand, Three Hundred, Thirteen and x/100 Dollars.
To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 7.

8. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 8, Exhibit G, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plantiffs and other reasons. (R. p. 138):

No. 1899

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

April 10, 1939.

Pay to the order of E. A. Pierce & Company $1,100.00—Eleven Hundred Dollars only.
To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 8.

9. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in

[fol. 193] Exception No. 9, Exhibit H, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 138):

No. 1911

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

Pay to the order of E. A. Pierce & Company $3,535.00—Three Thousand Five Hundred and Thirty-five and x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 9.

10. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 10, Exhibit I, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial, although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons (R. p. 139):

No. 2118

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

December 19, 1939.

[fol. 194] Pay to the order of Cash $15,000.00--Fifteen Thousand and x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 10.

11. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 11, Exhibit J, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs and other reasons. (R. p. 139):

No. 2123

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

December 22, 1939.

Pay to the order of Cash $5,000.00—Five Thousand and x/100 Dollars.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 11.

12. The Superior Court erred in allowing into the evidence, over the objection of the defendant, as set out in Exception No. 12, Exhibit K, set out below, for that the said Exhibit was not material to the issues involved in the case and was prejudicial to the defendant, was not properly identified and was not the best evidence, and that the Court [fol. 195] failed to pass upon the introduction of said Exhibit at the time of the trial although an objection was made to the introduction of said Exhibit at the time of the taking of the deposition by the plaintiffs, and other reasons. (R. p. 140):

No. 2119

"Daniel F. Boone

Attorney at Law

Suite 110 Robert E. Lee Hotel

Winston-Salem, N. C.

12/20th, 1939.

Pay to the order of Cash $5,000.00—Five Thousand Dollars and x/100.

To Wachovia Bank & Trust Company, Winston-Salem, N. C.

Daniel F. Boone."

This constitutes Assignment of Error No. 12.

13. The Court erred as set forth in defendant's Exception No. 13 (R. p. 145) charging the jury as follows:

"The burden is on the plaintiffs to satisfy you by the greater weight of the evidence on that issue as to their contentions relating thereto; and they say that from the defendant's own admissions he has not administered the said trust fund as provided for by the will of Frances M. Lightner, and they ask you, under all the evidence, to answer the third issue No; If You Shall Fail so to Find, Then You Should Answer the 3rd Issue Yes."

This constitutes Assignment of Error #12.

14. The Court erred as set forth in defendant's Exception No. 14 (R. p. 146) in inserting in the charge the following, to-wit:

"If you shall fail so to find, then you should answer the 3rd issue Yes."

The grounds of this assignment of error is that the Court inserted this in the charge of its own volition when the case on appeal was settled when said portion inserted was not [fol. 196] in the record of the charge as reported by the court reporter and was not in plaintiffs' counter-case on appeal.

This constitutes Assignment of Error #14.

15. The Court erred as set forth in defendant's Exception No. 15 (R. pp. 146-147) in charging the jury as follows:

"The fifth issue is: 'What amount, if any, has the defendant received as dividends and profits on said funds?' The burden as to that issue is upon the plaintiff to satisfy you by the greater weight of the evidence of their contentions relating thereto; and they insist that from all the evidence that you should find, and find by the greater weight thereof, that the defendant, Daniel F. Boone, has received on this account as dividends and profits the sum of $4,228.89, and that you should answer that issue, the fifth issue, in said amount; or if you fail to answer it in said amount you should answer it in a substantial amount.

"The burden is on the plaintiff to satisfy you on this issue, first, that you should answer it in any amount, and second, what amount.

"The defendant insists you should not answer it in any amount, on the contention that he wasn't required to give any accounting whatever; that he has not accounted to any person, or Court, or anyone whatsoever."

This constitutes Assignment of Error #15.

16. The Court erred in failing to state in a plain and concise manner the evidence in the case and to explain the law arising thereon in accordance with Consolidated Statutes 564 as set forth in Exception No. 16 (R. p. 149).

This constitutes Assignment of Error #16.

17. The Superior Court erred in overruling defendant's motion to set the verdict aside as set forth in defendant's [fol. 197] Exception No. 17, (R. p. 150).

This constitutes Assignment of Error #17.

18. The Court erred in its judgment as appears in the record and in signing same, as set forth in defendant's Exception No. 18 (R. p. 150).

This constitutes Assignment of Error No. 18.

19. The Court erred in its judgment as appears in the record in making finding of fact #4 as to the present value of the securities constituting the trust fund. The grounds for this Assignment of Error, among others, are that the facts found by the Court constitute an issue of fact for the

jury and not a question of fact for the Court and the Court invaded the province of the jury in attempting to make such finding.

This constitutes Assignment of Error #19.

20. The trial Court erred in entering the judgment which appears of record by inserting under Finding of Fact #5 mixed conclusions of law and fact, to the effect that under the law of North Carolina a trustee cannot invest the trust fund in such stocks as these funds were invested in. The grounds for this Assignment of Error are that the Court erred as a matter of law for the reason that it has been held in the case of *Sheets* v. *J. G. Flynt Tobacco Company,* that trust funds may be invested in stocks and other securities if the investments are made in good faith and with ordinary business prudence; additional grounds for this Assignment of Error are that the Court again has invaded the province of the jury in finding that such investments were made wrongfully.

This Constitutes Assignment of Error #20.

21. The trial Court erred in finding as a fact in the judgment that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his Military Service has not prevented him from doing [fol. 198] this for that the said Court had no power to make such finding and that there is no evidence in the record to sustain such finding of fact in the judgment.

This constitutes Assignment of Error #21.

22. The trial Court erred in finding as a fact in the judgment the following:

"It is apparent that he only sought to use the provisions of the Soldiers and Sailors Civil Relief Act as a shield for his wrongdoing."

The grounds for this assignment are that the Court had no power in the judgment to make such findings and that there is no evidence in the record to sustain such finding of fact.

This constitutes Assignment of Error #22.

23. The Court erred in its judgment in finding as a fact the following:

"That the said fund has been increased by dividends and profits in the sum of $4228.89 and that the defendant, Daniel F. Boone, individually, is accountable for the total of the two sums mentioned, that is to say, the total sum of $19,677.99." Grounds for this assignment are that there is no evidence to sustain such finding and that the said finding is contrary to all the evidence in the record.

This constitutes Assignment of Error #23.

24. The trial Court erred in its judgment in taking judicial notice of the value of the stocks involved as quoted in the daily newspaper for that the said action of the Court is contrary to law.

This constitutes Assignment of Error #24.

This the 3rd day of August, A. D. 1942.

Respectfully submitted, Williams & Cocke, Attorneys for Defendant.

(Clerk's certificate to foregoing transcript omitted in printing.)

[fol. 199] SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1942

No. 164

CLARENCE M. LIGHTNER, et al.,

v.

DANIEL F. BOONE, Trustee

Appeal by Defendant from Sink, J., May-June Term, 1942, of Henderson

Civil action for an accounting of trust funds.

By the will of Frances M. Lightner, late of Polk County, this State, published and probated in 1938, a trust fund of $40,000.00 was set aside for the proper college education of her grandchildren living at her death, and her son-in-law, Daniel F. Boone, an attorney of Winston-Salem, N. C., was named as trustee of this fund. An advisory committee was also named in the will, and the trustee was enjoined to consult this committee in the handling of the trust estate. The trust was to terminate as to each grandchild upon reaching the age of 30 years. After-born grandchildren were specifically excluded from the fund. The plaintiff, Martha Penelope Boone, who was born 14 September, 1938, falls in this excluded class.

In order to place the plaintiff, Martha Penelope Boone, on a parity with the other grandchildren, her grandfather, Clarence A. Lightner, assigned and transferred two of his life insurance policies, aggregating $15,449.10, to her mother, Martha Lightner Boone, with the understanding and agreement that the proceeds of such insurance, when collected, should constitute a trust fund for the education of Martha Penelope Boone, on the same terms and provisions as set forth in the will of Frances M. Lightner for the management and control of the educational trust fund provided therein for the other grandchildren. Clarence A. Lightner died 8 December, 1938. His life insurance policies were duly collected and the proceeds were turned over to the defendant as an educational trust fund for the benefit of Martha Penelope Boone. The other plaintiffs allege an interest in this fund in case the whole fund is not properly expended prior to her attaining the age of 30 years.

Due to disclosures made in other litigation, Lightner v. Boone, 221 N. C. 78, 19 S. E. (2d) 144, the plaintiffs became apprehensive of the safety of the trust fund here involved, and on 21 June, 1941, they instituted this action in Polk County and caused summons and complaint to be personally served on the defendant on 23 June, 1941, by the Sheriff of Forsyth County. The defendant filed answer 5 August, [fol. 200] 1941, asking that the action be dismissed for that "because of what took place in the Superior Court of Forsyth County" on 23 June, 1941, he had concluded "on that date" to terminate his previous North Carolina domicile and residence and change it to Washington, D. C., by reason of which the courts of this State are without any jurisdiction in the matter, and further alleging that by virtue of written instructions given by Clarence A. Lightner, prior to his death, the defendant was authorized to expend said funds, in his discretion, "for the general care and education of Martha Penelope Boone". The plaintiffs challange the validity of these instructions on the ground of mental incapacity of the maker. The defendant admitted "that he is not managing said fund pursuant to any directions in the will of Frances M. Lightner". His answer was signed by Roy L. Deal, Winston-Salem, N. C., attorney for defendant, and Clifford M. Toohy, Detroit, Mich., of counsel for defendant.

It appears that the defendant took a number of depositions in Washington and New York during the latter half of 1941, preparatory to his defense herein.

When the case was called for trial at the January-February Term, 1942, Polk Superior Court, the defendant, through his counsel, made application for a stay of the proceeding under the provisions of an Act of Congress, known as the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. A. Appendix 501 et seq. (printed in full in 130 A. L. R. 794), it being alleged that the defendant was a Major in the United States Army and had been called into active service on 8 November, 1940, and assigned to duty in Washington, D. C.

It was further made to appear that defendant's Michigan counsel was busily engaged in the trial of causes in Detroit and his resident counsel, also a major in the United States Army, was expecting to be called immediately into the military service, and that, therefore, it would be necessary for defendant to procure additional counsel.

The court transferred the case to Henderson Superior Court and ordered a continuance until the May-June Term, 1942, thereof, and set the case peremptorily for hearing on the first day of the term, counsel for defendant requesting "that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel". [fol. 201] On account of the nature of the action, and the charges involved, the court ordered the defendant to turn over to the Clerk of the Superior Court of Henderson County, on or before the 25th day of May, 1942, all securities, evidences of indebtedness, and moneys belonging to the said educational trust. It was further provided that a copy of the order be certified to the Adjutant General of the United States for such information and grants of leave as he might deem appropriate. These precautions were taken "to avoid undue delay to anyone".

When the case was again called for trial on 25 May, 1942, Henderson Superior Court, the defendant appeared through his counsel, R. R. Williams of the Asheville Bar, "for the sole purpose of moving for a continuance". The motion was overruled; whereupon counsel for the defendant declined to appear further in the case.

The trial proceeded before the jury and resulted in a verdict and judgment for plaintiffs. Judgment was signed on Tuesday 26 May. Two days later, on 28 May, Mr. Cocke of the firm of Williams & Cocke, appeared before the court, moved to set the verdict aside, objected to the judgment and the signing thereof, and gave notice of appeal to the Supreme Court.

J. E. Shipman and McCown & Arledge for plaintiffs, appellees.

R. R. Williams for defendant, appellant.

STACY, *C. J.*:

When the trial court was last called upon to stay proceedings herein under the Soldiers' and Sailors' Civil Relief Act of 1940, he was faced with defendant's report, filed that day with the Clerk of the Superior Court of Henderson County, showing the trust account to be in a precarious condition. Eight items therein, aggregating $1042.73, represented payments made by the defendant in preparing his defense in this action. Moreover, the admission in defendant's answer that he was "not managing said fund pursuant

to any directions in the will of Frances M. Lightner", and the allegation that he was proceeding under *ante mortem* instructions from Clarence A. Lightner, which the plaintiffs challenged because of alleged incapacity of the maker, were sufficient to put the court on notice and inquiry respecting the status of the fund in suit. The court observed: "From [fol. 202] the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense". It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. Carter v. Young, 193 N. C. 678, 137 S. E. 875. As said by Merrimon, J., in Albright v. Albright, 91 N. C. 220, "However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the *cestui que trust*, the court will promptly interpose its protective authority". See Young v. Hood, 209 N. C. 801, 184 S. E. 823; Heyer v. Bulluck, 210 N. C. 321, 186 S. E. 356, and cases there cited.

The burden of the appeal is, that the defendant has been deprived of his right to a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. This act provides:

"Sec. 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." 50 U. S. C. A. Appendix 521.

"Sec. 200. In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant • • • no judgment shall be entered • • • if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest", etc. 50 U. S. C. A. Appendix 520.

It was the opinion of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service. The judgment recites a factual finding "that the defendant has had ample time and opportunity properly to prepare his defense in this case and that his military service has not prevented him from doing this. • • • His failure properly to handle the [fol. 203] trust fund or to account for the same has not been affected in any way by reason of his military service". Indeed, the trial court was strongly convinced of the necessity of prompt action on the part of the court of equity to protect the fund in suit. He permitted the defendant to use the Act of Congress as a shield, and declined to permit him to use it as a sword. In this, we think the trial court pursued the intent of the statute. Pope v. U. S. Fidelity & Guaranty Co., 20 S. E. (2d) (Ga. App.) 618; Jamaica Sav. Bank v. Bryan, 175 Misc. 978, 25 N. Y. S. (2d) 17; Annotation, Soldiers' and Sailors' Civil Relief Acts, 130 A. L. R. 774.

Speaking to a similar situation in the *Pope Case, supra*, Sutton, J., delivering the opinion of the Court, said: "So, it will be seen that a person in the military service is not entitled to a stay of a judgment against him as a matter of law under the provisions of the act of Congress just referred to, where in the opinion of the court passing on the matter the ability of such person to comply with the judgment is not materially affected by reason of his military service; nor is such person entitled to a stay of a proceeding against him, merely by virtue of said act, unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his military service."

To like effect is the declaration of the Circuit Court of Appeals, Sixth Circuit, in the case of Royster v. Lederle, 128 F. (2d) 197: "The object of the Act was to prevent injury to the civil rights of those in the armed services of the United States during that service in order that they would be free to devote all of their energies to the military needs of the Nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable." See, also, Swiderski v. Moodenbaugh, 45 F. Sup. 790.

Nor was it error for the court to proceed without appointing an attorney to represent the defendant. Such is the

requirement only "if there shall be a default of any appearance by the defendant". Here, there was no default of any appearance by the defendant. He had duly filed answer. Depositions had been taken. His counsel appeared at the January-February Term, 1942, and moved for a continuance. This was granted, apparently upon satisfactory [fol. 204] terms. The defendant again appeared through counsel at the May-June Term, 1942, and moved for a continuance. It is true, counsel then announced that he appeared "for the sole purpose of moving for a continuance". Nevertheless, the appearance was general, and the court was presented with a discretionary matter.

The exceptions entered to the trial are untenable. The defendant admitted in his answer that $15,449.10 had been turned over to him as a trust fund for the benefit of Martha Penelope Boone. It was clearly made to appear on the hearing that the defendant had undertaken to speculate with these funds by investing them in a marginal account in his own name with a brokerage firm in New York. Upon such showing, the court was justified in holding the defendant liable as for a breach of trust, Annotation 106 A. L. R. 271, and proceeding as in equity seemed just and right. In re Estate of Smith, 200 N. C. 272, 156 S. E. 494; 19 Am. Jur. 152; 10 R. C. L. (Equity) 349; 26 R. C. L. (Trusts) 1359. No valid reason appears for interfering with the results of the trial.

No Error.

A true copy.

Adrian J. Newton, Clerk of the Supreme Court of North Carolina. (Seal.)

[fol. 205] IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPE, Mrs. Martha Lightner Boone and Martha Penelope Boone, a Minor, Represented in This Proceeding by Her Next Friend, C. Hauge, Plaintiffs,

v.

DANIEL F. BOONE, Trustee for Martha Penelope Boone, a Minor

Appeal Docketed 10 August, 1942

Case Argued 20 October, 1942

Opinion Filed 4 November, 1942

Final Judgment Entered 4 November, 1942

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 7 December, 1942.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina. (Seal.)

[fol. 206] [Endorsed:] No. 164. Friday, Oct. 30, 1942. Lightner v. Boone. Stacy, C. J. No error. Sch. Filed Nov. 4, 1942. In the Office of Clerk, Supreme Court of North Carolina, Henderson.

[fol. 207] SUPREME COURT OF THE UNITED STATES

[Title omitted]

No. 698, OCTOBER TERM, 1942

Order Allowing Certiorari. Filed March 8, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 208] LETTER RE STIPULATION AS TO RECORD

March 22, 1943.

Mr. Stuart H. Robeson
Attorney at Law
Investment Bldg.
Washington, D. C.

Dear Mr. ROBESON:

I have considered your letter of the 20th instant, and I cannot agree with you that the depositions in this case have no material relationship to the questions to be presented to the Supreme Court, and that they should therefore be omitted in printing the record. My idea is that these depositions were the most material thing, or among the most material things, which Judge Sink had to consider in passing on the motion for a continuance, and in view of that opinion we will insist that they remain in the record.

We are willing to agree to a stipulation omitting the printing of the following pages in No. 164 of the record in the Supreme Court of North Carolina:

(1) Pages 116 to 134, inclusive.
(2) Pages 152 to 190, inclusive.

You may prepare a stipulation to this effect if you desire, and I will be glad to sign it, or you can treat this letter as a consent to omit the printing of the part of the record stated above.

Yours very truly, McCown & Arledge, by M. R. McCown.

MRM:SM

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 2 1943
CHARLES ELMORE CROPLEY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 698

DANIEL F. BOONE, *Petitioner*,

v.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE and MARTHA PENELOPE BOONE, a Minor represented in this proceeding by her next friend, W. C. Hague.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND SUPPORTING BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

DANIEL F. BOONE, *Petitioner*,

v.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE and MARTHA PENELOPE BOONE, a Minor represented in this proceeding by her next friend, W. C. Hague.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Major Daniel F. Boone, by his attorneys, prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of North Carolina entered in the above cause on November 4, 1942, affirming the judgment of the Superior Court of Henderson County, North Carolina, entered on May 26, 1942 (R. 48).

OPINIONS BELOW.

The trial court wrote no formal opinion, but adopted findings of fact and conclusions of law in making orders and rendering a judgment. (See R. 39-60.)

The opinion of the Supreme Court of the State of North Carolina (R. 199) appears in 222 N. C. 205 (Adv. Sheets).

STATEMENT OF MATTER INVOLVED.

At all times during the period of this litigation, petitioner has been and now is a member of the armed forces of the United States on active duty and stationed in Washington, D. C.

This action was instituted against petitioner in the Superior Court of Polk County, North Carolina, on June 21, 1941. The purpose of the action was to declare petitioner a trustee of certain funds in his possession and to remove him as trustee in the event he failed to account for said funds (R. 7, 8).

Petitioner set forth his defense to the action in his answer (R. 24-36) to the complaint. In his answer, petitioner stated among other things, that he was on active duty in the armed forces and residing in the District of Columbia (R. 25).

The action came up for hearing on February 2, 1942, in the regular January-February term of the Superior Court of Polk County, North Carolina, at which time, petitioner moved the court for a continuance (R. 49); that the court thereupon transferred this action to the Superior Court of Henderson County, North Carolina, and set the case peremptorily for trial on May 25, 1942 (R. 50).

On May 13, 1942, twelve days before the trial, Major Roy L. Deal, counsel for petitioner, was called to active military duty in the armed forces of the United States (R. 57).

On May 25, 1942, when the Superior Court of Henderson County, convened, a written application and motion for a continuance of the action was filed in petitioner's behalf, praying for relief under the Soldiers' and Sailors' Civil

Relief Act of 1940 (54 Stat. 1178) and for a continuance of the trial of the action until after the termination of his military service, "or until such time as he can properly conduct his defense" (R. 55).

In support of the application and motion for a continuance or stay of proceedings, two affidavits were filed—one by petitioner and the other by Major Roy L. Deal, petitioner's local counsel (R. 58-9).

Petitioner's affidavit (R. 55) stated among other things: (1) that he was a Major on active duty in the United States Army, (2) that he had been assigned to and stationed at Washington, D. C., (3) that the volume of work in his office was extremely heavy and that no leaves were being granted, except in cases of serious emergency, (4) that the trial of the action would require the bringing of three witnesses to North Carolina from other states and that two of these were in the United States Army and not stationed in the State of North Carolina, (5) that local counsel for petitioner had entered on active military duty with the Army of the United States twelve days prior to the convening of the court, (6) that it was necessary for petitioner to obtain other local counsel to represent petitioner, and (7) that petitioner's ability to defend was materially affected by reason of his military service (R. 57-58).

The affidavit of Major Roy L. Deal (R. 58) set forth that (1) he was counsel for petitioner, (2) he was ordered to and entered active military service on May 13, 1942, at Washington, D. C., and (3) it was impossible for him to appear as attorney in the trial of the case, especially since leave was obtainable "only in special emergency."

Despite the fact that petitioner had complied with the order of the trial court of Polk County, North Carolina, entered February 2, 1942 (R. 43) and deposited the securities (which was the subject matter involved in the litigation) with the Clerk of the Superior Court of Henderson County, North Carolina, (R. 43), the trial court summarily and without a hearing or without further evidence before it, denied the application for a continuance of the action

(R. 59-60). The trial court completely failed to make any further inquiry or to take any testimony on whether the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

The trial court merely stated as a conclusion in its findings of fact that petitioner was "deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the act [Soldiers' and Sailors' Civil Relief Act] referred to above to avoid such determination" (R. 59). The Court further, *without any evidence or record before it to sustain the conclusion,* "found" that the motion for a continuance was made after petitioner's refusal "in one or more instances" in other litigation to "appear in the courts of North Carolina." The record does not disclose to what other litigation the Court refers, and the Court does not say. If the Court refers to the record of some other court in North Carolina, the authenticated record of such court should have been introduced. If it were a record of the trial court, judicial notice should have been taken of the particular record.

This vague and unsupported statement indicates that the trial judge was aware that his conclusion that the defendant's ability to defend the action was not materially affected by his military service lacked and badly needed supporting evidence.

Thereupon, "in the absence of the defendant and of any counsel representing the defendant, the Trial Judge proceeded to a trial of the case" (R. 61).

Among other things, the trial court on May 26, 1942, awarded a money judgment against petitioner in the sum of Nineteen Thousand Six Hundred Seventy-Seven Dollars and Ninety-Nine Cents ($19,677.99) on which a credit was allowed of Eight Thousand One Hundred Eighty-Seven Dollars and Forty-Three Cents ($8,187.43) and rendered a judgment in the sum of Eleven Thousand Four Hundred Ninety Dollars and Fifty-Six Cents ($11,490.56) (R. 46, 48).

On appeal to the court of last resort, the Supreme Court

of the State of North Carolina affirmed the trial court in all respects.

JURISDICTIONAL STATEMENT.

The statutory provision which sustains the jurisdiction of this court is Section 237 (b) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. § 344 (b) which provides that:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any * * * statute of, * * * the United States. * * * "

In this case, the right, privilege or immunity set up or claimed by Petitioner is granted to him under the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, and more particularly at 54 Stat. 1181.

The judgment of the Supreme Court of North Carolina was entered November 4, 1942, and is a final judgment against petitioner. It is, therefore, final for purposes of this Court's jurisdiction.

STATUTE RELIED UPON BY PETITIONER.

The Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, is relied upon by petitioner. Section 100 of the Act reads:

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to

enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

Section 201 of the Act reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person, on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Other pertinent sections of the Soldiers' and Sailors' Civil Relief Act of 1940 are set forth in the Appendix.

QUESTIONS PRESENTED.

(1) Did the Supreme Court of North Carolina err in sustaining a personal judgment against a member of the armed forces of the United States on active military duty at Washington, D. C., who could not be present in person to defend and who was not represented by counsel at the trial of an action brought against such army officer when such army officer moved for the relief provided him by an act of Congress, the Soldiers' and Sailors' Civil Relief Act of 1940?

(2) May a judgment be rendered against an army officer on active military duty, who claims the relief provided in the Soldiers' and Sailors' Civil Relief Act of 1940, when such officer specifically requests a continuance or stay of proceedings under Section 201 of said Act and makes a show-

ing to the trial court that his ability to conduct his defense has been and is materially affected by his military service, and there is no evidence before the trial court to sustain a finding that the ability of the petitioner to defend is not materially affected by military service?

(3) May a state court summarily brush aside the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and render a judgment against an army officer on active military duty who prays for the relief afforded by said Act?

(4) Was there compliance by the state courts of North Carolina with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and more particularly with Section 201 of said Act?

(5) Was there due process of law in a case wherein (1) an army officer is a defendant and cannot be present in person because of military service, (2) local counsel for the army officer cannot be present because he has recently entered upon active military service and (3) two important witnesses are outside of the State in military service and the court refuses to grant a continuance?

(6) May a trial court arbitrarily proceed with a trial without appointing an attorney to represent a person in military service who does not personally appear at the trial because he is on active military duty and cannot secure leave and is not represented by his attorney who is also on active military duty?

REASONS FOR GRANTING CERTIORARI.

Petitioner respectfully submits that the writ of certiorari should be granted in this cause for the following reasons:

(1) The state court has decided a Federal question of substance not heretofore determined by this court and the state court has given a construction to the Soldiers' and Sailor's Civil Relief Act of 1940 not intended by the Con-

gress and clearly in violation of the express words and intent of the Act.

(2) The state court has construed the Soldiers' and Sailors' Civil Relief Act in such a manner that if the interpretation is allowed to stand it will have a serious effect on the morale of the armed forces of the United States especially those men who may be sued in the state courts.

(3) The questions presented are of wide importance. There are many lawsuits filed against men on active duty in the armed forces of the United States and it is essential that all courts have an authoritative determination by this Court.

(4) A proper exposition of the intent of the Act is of great public importance, since all lawsuits filed against men in the armed forces of the United States come face to face with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

The foregoing propositions were presented to the Supreme Court of North Carolina but that court failed to place a proper construction upon the Soldiers' and Sailors' Civil Relief Act and also denied to the Petitioner the protection of the Fourteenth Amendment to the Constitution of the United States.

If the notion of the Supreme Court of North Carolina is allowed to stand then any trial court can proceed to hear a case and render a judgment against one in the armed forces by merely paying lip service to the Soldiers' and Sailors' Civil Relief Act of 1940. All that is necessary in order to conform to that Act, in the opinion of the North Carolina Court, is a statement by the trial court that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. This will be legal legerdemain and the result if the opinion of the North Carolina Supreme Court sought to be reviewed by this petition is allowed to stand.

WHEREFORE, your petitioner respectfully prays that this Court issue a Writ of Certiorari to the Supreme Court of the State of North Carolina, to certify and send to this Court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs and for such other and further relief as may be appropriate and granted in the premises.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

DANIEL F. BOONE, *Petitioner*,

v.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE and MARTHA PENELOPE BOONE, a Minor represented in this proceeding by her next friend, W. C. Hague.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of North Carolina sought to be reviewed is reported in 222 North Carolina reports 205 (advance sheets), and appears in the record filed herein beginning on page 199 and continuing through page 204 inclusive.

JURISDICTION.

The petitioner contends first, that under Section 237 (b) of the Judicial Code, as amended, he is entitled to have the opinion of the Supreme Court of North Carolina reviewed, since the petitioner has set up and claims a right, privilege,

or immunity, under a statute of the United States and such statute has not been properly construed by the Supreme Court of North Carolina.

Secondly, the petitioner contends there are two distinct federal questions involved. In the first instance, the Supreme Court of North Carolina failed to give a proper interpretation to a Statute of the United States. This results in a Federal question sufficient to warrant a review by this court.

In *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 40 (1941) this Court said:

> "• • • This action was based wholly on interpretation and application of the Securities Act. Thus a federal question arose which demands determination."

In *Nutt* v. *Knut*, 200 U. S. 12, 19 (1906) the Court said:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held • • • to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved." (citing cases)

The record in the state court clearly discloses that the Soldiers' and Sailors' Civil Relief Act of 1940 was set up and claimed and that relief pursuant thereto was denied as the court in its opinion states: "The burden of the appeal is that the defendant has been deprived of his right to a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940."

See *Seaboard Air Line Railway* v. *Duvall*, 225 U. S. 477, 488 (1912); *St. Louis, Iron Mountain and Southern Railway Co.* v. *Taylor, Administratrix*, 210 U. S. 281, 293 (1908).

In addition see *Ebert et al.* v. *Poston*, 263 U. S. 694 and

266 U. S. 548 (1925) where this Court granted certiorari in a case dealing with the Soldiers' and Sailors' Civil Relief Act of 1918.

In the second instance, the petitioner was deprived of property without due process of law, since the court of North Carolina could not by virtue of the Fourteenth Amendment to the Constitution of the United States proceed to a trial in the absence of the petitioner or of any attorney representing him and without appointing counsel to represent the petitioner. The absence of the petitioner and his counsel was not due to any negligence but was due to military service. The principles of justice without any Soldiers' and Sailors' Civil Relief Act warranted a continuance.

STATUTE INVOLVED.

The statute involved is the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178, 50 U. S. C. App. Sec. 501 *et seq.*). The pertinent provisions are set forth, *infra*, in the Appendix.

SPECIFICATION OF ERRORS TO BE URGED.

1. The lower court erred in failing to properly interpret the Soldiers' and Sailors' Civil Relief Act.

2. The lower court erred in failing to receive evidence or require some showing that the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

3. The lower court erred in denying petitioner's application for a continuance without first entering a proper factual finding, based upon evidence or affidavits, that the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

4. The lower court erred in proceeding to trial in the absence of the petitioner and his counsel.

5. The lower court erred in proceeding to trial without appointing an attorney to represent petitioner in accordance with the provisions of the Soldiers' and Sailors' Civil Relief Act.

6. The lower court deprived petitioner of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by proceeding to trial under the circumstances.

SUMMARY OF ARGUMENT.

This Court has not had occasion to decide any case in which an application for a continuance or stay of proceedings has been made by an army officer in active military service pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act.

At the outset, we should point out that there is no question whatsoever that petitioner is within the purview of persons covered by the Soldiers' and Sailors' Civil Relief Act of 1940 (see section 101 (1) of the Act). Furthermore, there is no question that the Superior Court of Henderson County, North Carolina, is covered by the provisions of the Act (see section 101 (4)).

The entire case revolves about (1) the relief afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 and the true construction of certain provisions in such Act and (2) even if there were no specific provisions in the Soldiers' and Sailors' Civil Relief Act of 1940 dealing with continuances and stays of proceedings of cases against men in the armed forces that the principles of justice under the due process clause of the Fourteenth Amendment to the Constitution would require that courts give serious consideration in granting continuances in cases affecting men on active duty in the armed forces of the country when such soldier could not personally be present to defend at the time the cause was set for hearing and in light of the further fact that his local counsel was also absent because of active mili-

tary service. We submit that phase (2) was not presented to the state court with any emphasis.

The legislative purpose of the Act (clearly stated in express words in section 100) was to suspend enforcement of civil liability in certain cases of absence in military service of the United States, in order to permit such persons to devote their entire energy to the defense needs of the Nation. We must bear in mind that the Act was enacted prior to any declaration of war by or against our country. Today, it is much more necessary for the courts to carry out the express mandate of the Congress.

Section 201 of the Act provides the fundamental basis for the procedure used by petitioner in the lower court in requesting the continuance or stay of proceedings and also is relied upon by the lower court in denying the relief requested.

Petitioner contends that this court as determined in *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935) and cases cited therein should and may review the record in order to determine whether or not there was a basis for the refusal by the state courts to enforce the federal right, privilege, or immunity granted by section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner contends that (1) there is not a scintilla of evidence in the record (not even dehors the record) to support a finding by the state court that petitioner's ability to conduct his defense is not materially affected by reason of his military service; (2) Section 201 of the Soldiers' and Sailors' Civil Relief Act requires a finding by the trial court that the ability of a "defendant to conduct his defense is not materially affected by reason of his military service" to be based on evidence and the burden of proof is on the party submitting such evidence as was so well stated by Judge Delehant in *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) at 743; (3) the lower court if it based its finding on any evidence whatsoever could not reasonably have so found because definitely contrary to fact, and a reading of the rec-

ord by this court will prove this; (4) the lower court was arbitrary and capricious in refusing the continuance or stay of proceedings to the petitioner when petitioner was on active military duty and in addition his local counsel was not available because local counsel had also been called to active duty in the armed forces just twelve days before the cause came up for trial; (5) the policy of Congress in writing the Soldiers' and Sailors' Civil Relief Act is pushed aside by the treatment accorded petitioner by the state courts and if allowed to prevail will undermine the morale of the men fighting on many fronts and more especially those who have been or will be sued in state courts and more particularly the courts of North Carolina.

ARGUMENT.

I.

Purpose of Soldiers' and Sailors' Civil Relief Act of 1940.

Section 100 of the Act clearly states the legislative purpose of the Act.

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

It is clear that a reversal of the state court by this Court will not affect any of the rights of the plaintiffs in the lower court. The day of reckoning is merely delayed and the army

officer who was several hundred miles away when his interests were being affected will not be harassed by litigation and thus be given a full opportunity to render that full measure of devotion to duty that he has sworn to render. At a more opportune time the merits of the case can be determined with all parties having their day in court.

The bona fides of the petitioner is clearly demonstrated by his deposit with the clerk of the trial court the subject matter of the trust in litigation and no loss can result to plaintiffs from this aspect.

II.

State Court Did Not Comply With Section 201 of Soldiers' and Sailors' Civil Relief Act of 1940.

This argument of petitioner revolves about a correct construction and interpretation of Section 201 of the Act.

Section 201 reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such persons or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

There is no question whatsoever that application on behalf of the petitioner was filed in proper time for the relief accorded by this section to him as a defendant. The section speaks in mandatory language when an application is filed by the person in the armed forces or by someone in his behalf.

The issue is joined on the proper construction of the words:

> "unless, in the opinion of the court, the ability of • • • the defendant to conduct his defense is not materially affected by reason of his military service."

A. No evidence to support state court's finding.

This court may and should read the record in order to determine whether there was evidence to sustain a finding by the trial court (R. 59) that the ability of petitioner to conduct his defense was not materially affected by his military service.

We submit that "lip service" by the state court is not enough in carrying out the provision of the law.

In *Norris* v. *Alabama*, 294 U. S. 587 (1935) at 590:

> "• • • When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (citing cases)

All that the lower court had before it in connection with the question of petitioner's ability to conduct his defense were the affidavits of petitioner (R. 55) and his counsel (R. 58). True, the court also had the complaint (R. 7) and the answer (R. 24-36) filed by petitioner but it cannot be fairly concluded that the court could rule that petitioner had no defense by merely reading the answer and thereupon going the next illogical step and concluding that the ability of petitioner to conduct his defense was not materially affected by reason of his military service.

Yet, this is exactly what the trial court did and the Supreme Court of North Carolina gives its voice of approval to such procedure. The trial court stated "From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it ap-

pears that the defendant did not have a defense." O tempora! O mores! Such legal legerdemain when a trial judge desires to reach a certain conclusion!

The absence of petitioner from the trial, the fact that he had no active counsel in the case, the fact that leave of absence from military duty is an exception (granted in dire emergencies only) and not the rule in time of war and the fact that a personal judgment of over eleven thousand dollars is rendered would make one hesitate to conclude that military service did not materially affect petitioner's ability to defend.

B. Burden of proof on person objcting to continuance.

We submit that the burden of proving that no continuance or stay of proceedings should be granted is upon the parties objecting to the continuance.

In *Bowsman* v. *Peterson,* 45 F. Supp. 741 (D. Neb. 1942) plaintiff brought action to recover for injuries and property damage resulting from an automobile accident. Motion of the defendant to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940 was sustained. Judge Delehant analyzes sections 201 and 204 of the act very clearly and we quote from his opinion here and elsewhere in this brief. At 45 F. Supp. 743, Judge Delehant states:

> "In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered that, circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of the stay mandatory, 'unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.

> "No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful or the showing made in furtherance thereof persuasive."

In the case at bar no attempt was made by any of the parties to show that petitioner's ability to conduct his defense was not materially affected by his military service because we submit that it was and is factually an impossibility.

III.

Liberal Interpretation of the Act is Proper.

In *Royster* v. *Lederle,* 128 F. (2d) 197 (C. C. A. 6th, 1942) a writ of mandamus was filed to compel Judge Lederle to vacate and set aside his order of continuance in *Royster* v. *Ruggerio,* 2 F. R. D. 429 pursuant to section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner had suffered injuries in an automobile accident and sued "X" prior to his induction into the armed forces. "X" had also been found guilty of reckless driving and was given a probated sentence. Petitioner was willing to proceed with the case and was anxious to limit recovery to the liability insurance policy carried by "X" and petitioner further maintained that "X" had no defense because of his testimony in criminal court and therefore, "X" would not be of material aid to the insurance carrier. The desires of the petitioner were not granted although the court added an additional protection for her benefit in sustaining a continuance.

Judge Hamilton said at 128 F. (2d) 200:

> "The statute in question must be liberally construed to effectuate its purpose. We cannot say, as a matter of law, that Ruggerio's rights would not be affected by proceeding to the trial of the cause in his absence. * * * A party to an action should not be compelled to go to trial in his absence or in the absence of the only witness by whose testimony he can make out his defense, unless it appears that he has been guilty of negli-

gence in failing to attend the trial or procuring the attendance of the witness on whom he relies or in obtaining his testimony by deposition or otherwise. Ruggerio has not been guilty of any negligence in failing to attend the trial, and his insurance carrier likewise has not been guilty of negligence in failing to obtain his attendance at the trial or to take his deposition."

See also *Clark* v. *Mechanics' American Nat. Bank et al.*, 282 Fed. 589 (C. C. A. 8th, 1922).

In *Ilderton* v. *Charleston Consol. R. Co.*, 113 S. C. 91, 101 S. E. 282 (1919), an employer was sued for damages suffered by plaintiff. The motorman for whose negligence the employer was sued was in the armed forces. The court held that the trial court should have granted the defendant's motion for a continuance because the motorman was interested in the outcome of the suit for the reason that if it were decided adversely to the employer the motorman would be liable over. Furthermore, the motorman was the only witness whereby the employer could defend and the Supreme Court of South Carolina held that a continuance should have been granted.

The *Ilderton* case indicates a true construction and understanding of the relief provided by the Act.

IV.

Analysis of Cases Cited by North Carolina Supreme Court on Act.

The North Carolina Supreme Court in its opinion (R. 203) cites several cases in support of its conclusion. We submit that these cases are not in point.

(1) *Pope* v. *United States Fidelity & Guaranty Co.*, ... Ga. App. ...., 20 S. E. (2d) 618 (1942).

In May, 1934, a *judgment* was rendered against Mr. Pope and the U. S. F. & G. became the transferee thereof. In May, 1941, U. S. F. & G. had the sheriff levy on the life estate of Mr. Pope in certain lands and the property was being advertised for sale in September, 1941; furthermore

U. S. F. & G. garnished a third party in June, 1941, and the third party admitted an indebtedness of $622.77 to Mr. Pope and the third party paid the indebtedness into court. Mr. Pope was on duty as a lieutenant-colonel in South Carolina and he asked for a suspension and abatement of the proceedings while he was in the military service. The lower court granted a thirty-day stay. Subsequently U. S. F. & G. readvertised the property for sale and Mr. Pope again filed his motion for a further stay which the lower court denied and on appeal to the Court of Appeals of Georgia, this action was affirmed.

The *Pope* case dealt with a *judgment* rendered seven years before the U. S. F. & G. started the proceedings in the case. Colonel Pope did not file any affidavit showing that his ability to *pay* was materially affected by his military service. In fact, U. S. F. & G. filed a lengthy affidavit showing among other things the lack of good faith in the case and in addition the earnings of Colonel Pope. In other words, U. S. F. & G. introduced a verified answer to the effect that Colonel Pope could comply with the judgment. (See opinion at 20 S. E. (2d) 620).

We submit that much of the language used by Judge Sutton in discussing the Soldiers' and Sailors' Civil Relief Act if removed from the context and frame of the opinion could be criticized. Suffice it to say, however, at this point, that the Georgia Court had before it evidence demonstrating an ability to pay an old judgment procured before Colonel Pope had entered on active duty while the case at bar has no evidence whatsoever that petitioner's ability to defend has not been materially affected by his military service.

But compare *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) with the *Pope* case.

(2) *Jamaica Sav. Bank* v. *Bryan, et al.*, 175 Misc. 978, 25 N. Y. S. (2d) 17 (1941).

Plaintiff bank sought to foreclose a mortgage and named several defendants including the owner and her husband who claimed he was a soldier. Husband and wife asked the

court to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. The court felt it needed and asked for proof on the point that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. That is all the case stands for because the court felt that the "soldier" defendant was liable on the bond with his wife, the owner of the property.

Subsequent thereto (Supreme Court of North Carolina does not cite) *Jamaica Sav. Bank* v. *Bryan et al.*, 25 N. Y. S. (2d) 641 (1941) came up for determination. The court then pointed out that the "soldier"-husband was not liable on the bond and was a nominal defendant because of occupancy. Furthermore, he really was only in the National Guard and his military duties did not require his full time. The court concluded that the Soldiers' and Sailors' Civil Relief Act of 1940 was not applicable.

Need petitioner say anything further about the *Jamaica* case cited by the Supreme Court of North Carolina?

V.

Other Pertinent Cases on the Act.

In *Swiderski* v. *Moodenbaugh*, 44 F. Supp. 687 (D. Oregon, 1942) an action was brought against a soldier for injuries sustained by plaintiff in a collision with a car driven by defendant-soldier. The action was brought when defendant was out of the service and he attended the pre-trial conferences and his deposition was taken as an adverse witness while he was on inactive duty (to all practical purposes a civilian). The trial was delayed but, the case was finally called for trial when the defendant was back on active duty. Plaintiff agreed to limit his recovery to the casualty insurance policy carried by defendant and further not to seek a personal judgment against defendant. The court, thereupon, allowed the trial to proceed and denied the motion of defendant for a postponement of further action. But compare *Lanham et al.* v. *Cline*, 44 F. Supp. 897 (D. Idaho, 1942).

See *Korsch* v. *Lambing*, 28 N. Y. S. (2d) 167 (1941) where the stay was granted because defendant was in the service and was a necessary witness to the defense. See also Annotations in 130 A. L. R. 774-812 and 137 A. L. R. 451-455.

In *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb., 1942) the court in granting a motion to stay the proceedings stated at p. 743:

> "But here the statute seems to be imperatively controlling both as to the necessity for the stay, 50 U. S. C. A. Appendix § 521, and for practical purposes, as to its duration, 50 U. S. C. A., Appendix § 524. By Sec. 524, it is provided that 'Any stay of any action • • • ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period • • •'. It is true that the language is permissive. But it is likewise obvious that it reflects an instructive legislative policy to place the person engaged in the military establishment beyond the effect of the urgencies and uncertainties of pending litigation, and to allow him a reasonable period following his discharge to reorient himself with a view to the trial of his cause. So, if a continuance is in order, there would seem to be a rather clear congressional intimation that in the ordinary case it should be granted in general terms for the duration of the applicant's service and three months thereafter.' It is presently impracticable to attempt to limit stays, except in extraordinary cases, to 'any part of such period.'
>
> Section 521 deals with the conditions under which a stay of proceedings will be allowed. It provides that: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant

to conduct his defense is not materially affected by reason of his military service.'

In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered that, circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of a stay mandatory, 'unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.

No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful, or the showing made in furtherance thereof persuasive.

The Soldiers' and Sailors' Civil Relief Act of 1940 (in like manner with all similar previous acts in our history) was prompted by at least two considerations, first, the maintenance in the armed forces of a reasonable measure of that unbothered serenity and security in respect of personal responsibilities which effectively promotes military efficiency and the national defense; and secondly, the assurance that in the field of individual justice no advantage in judicial proceedings by or against a soldier or sailor will result from his absorption in his country's defense.

The soldier or sailor in seasons of war has neither time nor mental aptitude for litigation. Without unnecessary discussion, it may simply be stated that while the Act recognizes that in some instances 'the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service,' such instances will be relatively rare. And the court is not made aware of any circumstances upon which it may be concluded that this is one of them.

There is nothing novel either in the legislation which the defendant now invokes, or in the policy of the judicial and social indulgence towards the absent soldier. Only presumption would impel a judge, in a memorandum of this character, to assemble from legal and gen-

eral literature the abundant examples of the latter grace. And as to the former, it will be sufficient merely to mention the numerous statutes enacted during the Civil War upon the point (vide: 13 C. J. 143, Title, Continuances Sec. 42 (2), Note 68 and cases cited; 17 C. J. S., Continuances, § 30) and the more recent Soldiers' and Sailors' Civil Relief Act of 1918, 50 U. S. C. A., Appendix § 101, et seq., especially Secs. 112 and 115. It may be granted that a continuance will probably operate at least temporarily and perhaps permanently to the disadvantage of the plaintiff. That result is unfortunate. But it is a reasonable exaction by society from one of its members for its own preservation; a proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to 'provide for the common defense.' ''

CONCLUSION.

An army officer on active military duty and entitled to the relief of the Soldiers' and Sailors' Civil Relief Act of 1940 is denied a continuance of a case in which he is the defendant. The trial court summarily concludes that the army officer's ability to defend is not materially affected by such military service and proceeds to grant a personal judgment against such army officer despite the fact that (1) local counsel for the army officer cannot participate in the trial because he, too, has reported for active military duty just twelve days before the trial, (2) the army officer is several hundred miles away and cannot get leave except in serious emergencies, (3) affidavits are submitted by such army officer and his local counsel and a request for a continuance is made, (4) no proof is submitted by anybody that such army officer can conduct his defense and that his ability is not materially affected by military service, (5) such army officer has a defense to the serious and personal charges made against him, and (6) a substantial sum of money is involved.

The relief afforded by the Soldiers' and Sailors' Civil Relief Act should not be so lightly brushed aside by any court. Our country is at war and the morale of the members of the

armed forces must be sustained. That is part of the battle on the home front. Yet the North Carolina courts, in this case, have paid homage to the act by merely noting its provisions. There is not a scintilla of evidence in the record to justify the treatment accorded petitioner in the state courts.

The North Carolina courts, in this case, merely pay "lip service" to the Soldiers' and Sailors' Civil Relief Act and proceed to sustain a personal judgment against an army officer who has a defense to the action, but who could not attend the trial because of his military duties.

It is petitioner's contention that the statutory continuance allowed him by the Act placed the burden of proving his ability to defend was not materially affected by his military service squarely on those who opposed the continuance. No evidence was submitted by the other side. Perhaps it was unnecessary because the trial judge seems to have moved on his own initiative. Such treatment to a soldier of the United States by state courts will not be allowed, we trust, so long as this Court sits.

We submit that a refusal to grant the petition will place this Court's stamp of approval on the treatment accorded petitioner which will have deleterious effects on the morale of the members of our armed forces. Such adverse news will spread throughout the entire Army and Navy here and abroad and will create a disturbance of mind in the men away from home that they are not secure in their rights and property.

The right, privilege, or immunity given to petitioner by the Federal Act cannot be frittered away so easily by mere words of a trial judge.

We submit that the Court should grant the Writ of Certiorari in order to properly construe the Act passed by the Congress as part of its war legislative program to the end

that justice may be done directly to a member of the armed forces and indirectly to the millions of men and women who are fighting on every front.

Respectfully submitted,

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APPENDIX.

Pertinent Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940.

54 STAT. 1178

Section 101.

"(1) The term 'persons in military service' and the term 'persons in the military service of the United States,' as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service,' as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

• • • • • • • • • • •

"(3) The term 'person,' when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association."

• • • • • • • • • • •

"(4) The term 'court,' as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

• • • • • • • • • • •

Section 200. • • •

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney

appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."

• • • • • • • • • • •

Section 201.

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

• • • • • • • • • • •

Section 205.

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 698.

DANIEL F. BOONE, *Petitioner*,

v.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE and MARTHA PENELOPE BOONE, a Minor represented in this proceeding by her next friend, W. C. Hague.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

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OPINIONS BELOW.

The trial court wrote no formal opinion, but adopted findings of fact and conclusions of law in making orders and rendering a judgment (See R. 33-40, 49-50).

The opinion of the Supreme Court of the State of North Carolina (R. 127) appears in 222 N. C. 205 (Adv. Sheets), 22 S. E. (2d) 426.

JURISDICTION.

The jurisdiction of this Court is conferred by Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. A final judgment was entered November 4, 1942, by the Supreme Court of North Carolina. The writ of certiorari was granted March 8, 1943 (R. 135).

STATUTE INVOLVED.

The Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, is relied upon by petitioner. Section 100 of the Act reads:

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

Section 201 of the Act reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person, on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Other pertinent sections of the Soldiers' and Sailors' Civil Relief Act of 1940 are set forth in the Appendix.

QUESTIONS PRESENTED.

(1) Did the Supreme Court of North Carolina err in sustaining a personal judgment against a member of the armed forces of the United States on active military duty at Washington, D. C., who could not be present in person to defend and who was not represented by counsel at the trial of an action brought against such army officer when such army officer moved for the relief provided him by an act of Congress, the Soldiers' and Sailors' Civil Relief Act of 1940?

(2) May a judgment be rendered against an army officer on active military duty, who claims the relief provided in the Soldiers' and Sailors' Civil Relief Act of 1940, when such officer specifically requests a continuance or stay of proceedings under Section 201 of said Act and makes a showing to the trial court that his ability to conduct his defense has been and is materially affected by his military service, and there is no evidence before the trial court to sustain a finding that the ability of the petitioner to defend is not materially affected by military service?

(3) May a state court summarily brush aside the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and render a judgment against an army officer on active military duty who prays for the relief afforded by said Act?

(4) Was there compliance by the state courts of North Carolina with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and more particularly with Section 201 of said Act?

(5) Was there due process of law in a case wherein (1) an army officer is a defendant and cannot be present in

person because of military service, (2) local counsel for the army officer cannot be present because he has recently entered upon active military service and (3) two important witnesses are outside of the State in military service and the court refuses to grant a continuance?

(6) May a trial court arbitrarily proceed with a trial without appointing an attorney to represent a person in military service who does not personally appear at the trial because he is on active military duty and cannot secure leave and is not represented by his attorney who is also on active military duty?

STATEMENT OF MATTER INVOLVED.

At all times during the period of this litigation, petitioner has been and now is a member of the armed forces of the United States on active duty and stationed in Washington, D. C.

This action was instituted against petitioner in the Superior Court of Polk County, North Carolina, on June 21, 1941. The purpose of the action was to declare petitioner a trustee of certain funds in his possession and to remove him as trustee in the event he failed to account for said funds (R. 2, 6).

Petitioner set forth his defense to the action in his answer (R. 20-30) to the complaint. In his answer, petitioner stated among other things, that he was on active duty in the armed forces and residing in the District of Columbia (R. 21, 29).

The action came up for hearing on February 2, 1942, in the regular January-February term of the Superior Court of Polk County, North Carolina, at which time, petitioner moved the court for a continuance (R. 41); that the court thereupon transferred this action to the Superior Court of Henderson County, North Carolina, and set the case peremptorily for trial on May 25, 1942 (R. 42).

On May 13, 1942, twelve days before the trial, Major Roy L. Deal, counsel for petitioner, was called to active military duty in the armed forces of the United States (R. 49).

On May 25, 1942, when the Superior Court of Henderson County convened, a written application and motion for a continuance of the action was filed in petitioner's behalf, praying for relief under the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178) and for a continuance of the trial of the action until after the termination of his military service, "or until such time as he can properly conduct his defense" (R. 46).

In support of the application and motion for a continuance or stay of proceeedings, two affidavits were filed—one by petitioner and the other by Major Roy L. Deal, petitioner's local counsel (R. 46-49).

Petitioner's affidavit (R. 46) stated among other things: (1) that he was a Major on active duty in the United States Army, (2) that he had been assigned to and stationed at Washington, D. C., (3) that the volume of work in his office was extremely heavy and that no leaves were being granted, except in cases of serious emergency, (4) that the trial of the action would require the bringing of three witnesses to North Carolina from other states and that two of these were in the United States Army and not stationed in the State of North Carolina, (5) that local counsel for petitioner had entered on active military duty with the Army of the United States twelve days prior to the convening of the court, (6) that it was necessary for petitioner to obtain other local counsel to represent petitioner, and (7) that petitioner's ability to defend was materially affected by reason of his military service (R. 48).

The affidavit of Major Roy L. Deal (R. 49) set forth that (1) he was counsel for petitioner, (2) he was ordered to and entered active military service on May 13, 1942, at Washington, D. C., and (3) it was impossible for him to appear as attorney in the trial of the case, especially since leave was obtainable "only in special emergency."

Despite the fact that petitioner had complied with the order of the trial court of Polk County, North Carolina, entered February 2, 1942 (R. 41) and deposited the securities (which was the subject matter involved in the litigation) with the Clerk of the Superior Court of Henderson County, North Carolina, (R. 46), the trial court summarily and without a hearing or without further evidence before it, denied the application for a continuance of the action (R. 49-50). The trial court completely failed to make any further inquiry or to take any testimony on whether the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

The trial court merely stated as a conclusion in its findings of fact that petitioner was "deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the act [Soldiers' and Sailors' Civil Relief Act] referred to above to avoid such determination" (R. 50). The court further, *without any evidence or record before it to sustain the conclusion,* "found" that the motion for a continuance was made after petitioner's refusal "in one or more instances" in other litigation to "appear in the courts of North Carolina." The record does not disclose to what other litigation the court refers, and the court does not say.

This vague and unsupported statement indicates that the trial judge was aware that his conclusion that the defendant's ability to defend the action was not materially affected by his military service lacked and badly needed supporting evidence.

Thereupon, "in the absence of the defendant and of any counsel representing the defendant, the Trial Judge proceeded to a trial of the case" (R. 51).

Among other things, the trial court on May 26, 1942, awarded a money judgment against petitioner in the sum of Nineteen Thousand Six Hundred Seventy-Seven Dollars

and Ninety-Nine Cents ($19,677.99) on which a credit was allowed of Eight Thousand One Hundred Eighty-Seven Dollars and Forty-Three Cents ($8,187.43) and rendered a judgment in the sum of Eleven Thousand Four Hundred Ninety Dollars and Fifty-Six Cents ($11,490.56) (R. 39).

On appeal to the court of last resort, the Supreme Court of the State of North Carolina affirmed the trial court in all respects.

SUMMARY OF ARGUMENT.

There is no question whatsoever that petitioner is within the purview of persons covered by the Soldiers' and Sailors' Civil Relief Act of 1940 (see section 101(1) of the Act). Furthermore, there is no question that the Superior Court of Henderson County, North Carolina, is covered by the provisions of the Act (see section 101(4)).

The entire case revolves about (1) the relief afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 and the true construction of certain provisions in such Act and (2) even if there were no specific provisions in the Soldiers' and Sailors' Civil Relief Act of 1940 dealing with continuances and stays of proceedings of cases against men in the armed forces that the principles of justice under the due process clause of the Fourteenth Amendment to the Constitution would require that courts give serious consideration in granting continuances in cases affecting men on active duty in the armed forces of the country when such soldier could not personally be present to defend at the time the cause was set for hearing and in light of the further fact that his local counsel was also absent because of active military service. Phase (2) was not presented to the state court with any emphasis in this case.

The legislative purpose of the Act (clearly stated in express words in section 100) was to suspend enforcement of civil liability in certain cases of absence in military service of the United States, in order to permit such persons

to devote their entire energy to the defense needs of the Nation. We must bear in mind that the Act was enacted prior to any declaration of war by or against our country. Today, it is much more necessary for the courts to carry out the express mandate of the Congress.

Section 201 of the Act provides the fundamental basis for the procedure used by petitioner in the lower court in requesting the continuance or stay of proceedings and also is relied upon by the lower court in denying the relief requested.

Petitioner contends that this court as determined in *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935) and cases cited therein should and may review the record in order to determine whether or not there was a basis for the refusal by the state courts to enforce the federal right, privilege, or immunity granted by section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner contends that (1) there is not a scintilla of evidence in the record (not even dehors the record) to support a finding by the state court that petitioner's ability to conduct his defense is not materially affected by reason of his military service; (2) Section 201 of the Soldiers' and Sailors' Civil Relief Act requires a finding by the trial court that the ability of a "defendant to conduct his defense is not materially affected by reason of his military service" to be based on evidence and the burden of proof is on the party submitting such evidence as was so well stated by Judge Delehant in *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) at 743; (3) the lower court if it based its finding on any evidence whatsoever could not reasonably have so found because definitely contrary to fact, and a reading of the record by this Court will prove this; (4) the lower court was arbitrary and capricious in refusing the continuance or stay of proceedings to the petitioner when petitioner was on active military duty and in addition his local counsel was not available because local counsel

had also been called to active duty in the armed forces just twelve days before the cause came up for trial; (5) the policy of Congress in writing the Soldiers' and Sailors' Civil Relief Act is pushed aside by the treatment accorded petitioner by the state courts and if allowed to prevail will undermine the morale of the men fighting on many fronts and more especially those who have been or will be sued in state courts and more particularly the courts of North Carolina.

ARGUMENT.

I.

Purpose of Soldiers' and Sailors' Civil Relief Act of 1940.

Section 100 of the Act clearly states the legislative purpose of the Act.

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

The Act is designed to safeguard this army officer from being harassed by litigation while on active duty so that he may have full opportunity to render that full measure of devotion to duty that he is bound by oath to do. Obviously the purpose of the Act is not served when a state court proceeds with a trial against an army officer who is

several hundred miles away and particularly when he has no lawyer present to represent his interests.

> "Such legislation serves the dual purpose of enabling such persons to devote their entire energy to the defense needs of the nation and compensating them in some measure for that devotion. From the earliest times, those wielding the sovereign power have used such dispensations to strengthen the morale of their military forces."[1]

II.

State Court Did Not Comply With Section 201 of Soldiers' and Sailors' Civil Relief Act of 1940.

This argument of petitioner revolves about a correct construction and interpretation of Section 201 of the Act. The pertinent part of Secti n 201 reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, * * * during the period of such service or within sixty days thereafter * * * shall, on application to it (the court) by such persons or some person on his behalf, be stayed as provided in this Act, unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service."

There is no question whatsoever that application on behalf of the petitioner was filed in proper time for the relief accorded by this section to him as a defendant. The section speaks in mandatory language when an application is filed by the person in the armed forces or by someone in his behalf.

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[1] Soldiers' and Sailors' Civil Relief Act of 1940, (1940) 27 Va. L. Rev. 207, "Perhaps the first reference in legal writings to civil relief for soldiers exists in the *Coutume de Beauvaisis* of Beaumanoir (1283) where it was mentioned that such relief was accorded by the King to knights on crusade. See Blair, Breach of Contract Due to War (1920) 20 Col. L. Rev. 435."

The issue is joined on the proper construction of the words:

> "unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service."

A. No evidence to support state court's finding.

Section 201 of the Act requires a *judicial* opinion and not the personal opinion of the judge. Before exercising a *judicial* opinion evidence is required. The trial judge could not have exercised any judicial opinion because not a word of evidence was presented which would warrant a finding that the ability of the defendant to conduct his defense was not materially affected by reason of his military service.

This court may and should read the record in order to determine whether there was evidence to sustain a finding by the trial court (R. 50) that the ability of petitioner to conduct his defense was not materially affected by his military service.

We submit that the state court in fact merely noted the section and such is not enough in carrying out the provision of the law.

In *Norris* v. *Alabama*, 294 U. S. 587 (1935) at 590:

> "* * * When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (citing cases)

All that the lower court had before it in connection with

the question of petitioner's ability to conduct his defense were the affidavits of petitioner (R. 46) and his counsel (R. 49). True, the court also had the complaint (R. 2) and the answer (R. 20-30) filed by petitioner but it cannot be fairly concluded that the court could rule that petitioner had no defense by merely reading the answer and thereupon going the next illogical step and concluding that the ability of petitioner to conduct his defense was not materially affected by reason of his military service.

Yet, this is exactly what the trial court did and the Supreme Court of North Carolina gives its voice of approval to such procedure. The trial court stated "From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense." O tempora! O mores! Such legal legerdemain when a trial judge desires to reach a certain conclusion!

The absence of petitioner from the trial, the fact that he had no active counsel in the case, the fact that leave of absence from military duty is an exception (granted in emergency only) and not the rule in time of war and the fact that a personal judgment of over eleven thousand dollars is rendered would make one hesitate to conclude that military service did not materially affect petitioner's ability to defend.

B. Burden of proof on person objecting to continuance.

We submit that the burden of proving that no continuance or stay of proceedings should be granted is upon the parties objecting to the continuance.

In *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) plaintiff brought action to recover for injuries and property damage resulting from an automobile accident. Motion of the defendant to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940 was sustained. Judge Delehant analyzes Sections 201 and 204 of the act very

clearly and we quote from his opinion here and elsewhere in this brief. At 45 F. Supp. 743, Judge Delehant states:

> "In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered, that circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of the stay mandatory, 'unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.
>
> "No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful or the showing made in furtherance thereof persuasive."

In the case at bar no attempt was made by any of the parties to show that petitioner's ability to conduct his defense was not materially affected by his military service because we submit that it was and is factually an impossibility.

Assuming for the sake of the argument that the burden of proof is on petitioner, then we say he has sustained such burden. He asked for leave and was denied leave. Petitioner is assigned to an overworked military unit and leaves are granted in emergency cases only and his affidavit presented to the trial judge shows such fact (R. 47). Not a word of evidence impeaches this affidavit of petitioner.

III.

Liberal Interpretation of the Act is Proper.

In *Royster* v. *Lederle*, 128 F. (2d) 197 (C. C. A. 6th, 1942) a writ of mandamus was filed to compel Judge Lederle to vacate and set aside his order of continuance in *Royster* v.

Ruggerio, 2 F. R. D. 429 pursuant to Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner had suffered injuries in an automobile accident and sued "X" prior to his induction into the armed forces. "X" had also been found guilty of reckless driving and was given a probated sentence. Petitioner was willing to proceed with the case and was anxious to limit recovery to the liability insurance policy carried by "X" and petitioner further maintained that "X" had no defense because of his testimony in criminal court and therefore, "X" would not be of material aid to the insurance carrier. The desires of the petitioner were not granted although the court added an additional protection for her benefit in sustaining a continuance.

Judge Hamilton said at 128 F. (2d) 200:

> "The statute in question must be liberally construed to effectuate its purpose. We cannot say, as a matter of law, that Ruggerio's rights would not be affected by proceeding to the trial of the cause in his absence. * * * A party to an action should not be compelled to go to trial in his absence or in the absence of the only witness by whose testimony he can make out his defense, unless it appears that he has been guilty of negligence in failing to attend the trial or procuring the attendance of the witness on whom he relies or in obtaining his testimony by deposition or otherwise. Ruggerio has not been guilty of any negligence in failing to attend the trial, and his insurance carrier likewise has not been guilty of negligence in failing to obtain his attendance at the trial or to take his deposition."

See also *Clark* v. *Mechanics' American Nat. Bank et al.,* 282 Fed. 589 (C. C. A. 8th, 1922).

In *Ilderton* v. *Charleston Consol. R. Co.,* 113 S. C. 91, 101 S. E. 282 (1919), an employer was sued for damages suffered by plaintiff. The motorman for whose negligence the employer was sued was in the armed forces. The court held that the trial court should have granted the defendant's motion for a continuance because the motorman was inter-

ested in the outcome of the suit for the reason that if it were decided adversely to the employer the motorman would be liable over. Furthermore, the motorman was the only witness whereby the employer could defend and the Supreme Court of South Carolina held that a continuance should have been granted.

The *Ilderton* case indicates a true construction and understanding of the relief provided by the Act.

IV.

Analysis of Cases Cited by North Carolina Supreme Court on Act.

The North Carolina Supreme Court in its opinion (R. 131) cites several cases in support of its conclusion. We submit that these cases are not in point.

(1) *Pope* v. *United States Fidelity & Guaranty Co.*, ... Ga. App. ...., 20 S. E. (2d) 618 (1942).

In May, 1934, a *judgment* was rendered against Mr. Pope and the U. S. F. & G. became the transferee thereof. In May, 1941, U. S. F. & G. had the sheriff levy on the life estate of Mr. Pope in certain lands and the property was being advertised for sale in September, 1941; furthermore U. S. F. & G. garnished a third party in June, 1941, and the third party admitted an indebtedness of $622.77 to Mr. Pope and the third party paid the indebtedness into court. Mr. Pope was on duty as a lieutenant-colonel in South Carolina and he asked for a suspension and abatement of the proceedings while he was in the military service. The lower court granted a thirty-day stay. Subsequently U. S. F. & G. readvertised the property for sale and Mr. Pope again filed his motion for a further stay which the lower court denied and on appeal to the Court of Appeals of Georgia, this action was affirmed.

The *Pope* case dealt with a *judgment* rendered seven years before the U. S. F. & G. started the proceedings in the

case. Colonel Pope did not file any affidavit showing that his ability to *pay* was materially affected by his military service. In fact, U. S. F. & G. filed a lengthy affidavit showing among other things the lack of good faith in the case and in addition the earnings of Colonel Pope. In other words, U. S. F. & G. introduced a verified answer to the effect that Colonel Pope could comply with the judgment (See opinion at 20 S. E. (2d) 620).

We submit that much of the language used by Judge Sutton in discussing the Soldiers' and Sailors' Civil Relief Act if removed from the context and frame of the opinion could be criticized. Suffice it to say, however, at this point, that the Georgia Court had before it evidence demonstrating an ability to pay an old judgment procured before Colonel Pope had entered on active duty while the case at bar has no evidence whatsoever that petitioner's ability to defend has not been materially affected by his military service.

But compare *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) with the *Pope* case.

(2) *Jamaica Sav. Bank* v. *Bryan, et al.*, 175 Misc. 978, 25 N. Y. S. (2d) 17 (1941).

Plaintiff bank sought to foreclose a mortgage and named several defendants including the owner and her husband who claimed he was a soldier. Husband and wife asked the court to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. The court felt it needed and asked for proof on the point that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. That is all the case stands for because the court felt that the "soldier"-defendant was liable on the bond with his wife, the owner of the property.

The case was brought up later for determination in *Jamaica Sav. Bank* v. *Bryan, et al.*, 25 N. Y. S. (2d) 641 (1941), which fact is not brought out in the opinion of the North Carolina Supreme Court in the case at bar. The New York Court then pointed out that the "soldier"-

husband was not liable on the bond and was a nominal defendant because of occupancy. Furthermore, he really was only in the National Guard and his military duties did not require his full time. The court concluded that the Soldiers' and Sailors' Civil Relief Act of 1940 was not applicable.

Need petitioner say anything further about the *Jamaica* case cited by the Supreme Court of North Carolina?

The attitude of the North Carolina courts to the relief provided by the Soldiers' and Sailors' Civil Relief Act can be gleaned not only from the case at bar, but also from a later case—*Batts* v. *Little*, 222 N. C. 353, 23 S. E. (2d) 41 (1942). The defendant in *Batts* v. *Little* was a sergeant in the United States Army; he was sued for damages for injuries caused by alleged negligence in the operation of an automobile; he denied the allegations in his answer. The defendant was transferred from a North Carolina camp to an unknown destination and when the cause came up for trial a verified application for relief under the Soldiers' and Sailors' Civil Relief Act was filed. The trial judge made the following order:

> "The above entitled causes having come on for trial at this term, and the plaintiffs having insisted upon a trial, and it appearing to the Court that the defendant is a Sergeant in the United States Army, and that his present whereabouts is unknown, and it further appearing to the Court that his presence in Court at any time in the future is exceedingly questionable, and it also appearing to the Court that the defendant is represented in the above causes by Messrs. Carr, James & Carr, Attorneys of the City of Wilmington, and the Court finding as a fact that these causes ought to be tried, and that there is no valid reason why the same should not be tried:"
>
> "It is now, upon motion of the plaintiffs, ordered and adjudged that the said causes be consolidated for the purpose of trial, and that they be set for hearing on Monday, November 2, 1942, and any motion made by the defendant for a continuance is disallowed."

"It is suggested by the Court that the whereabouts of the defendant be ascertained from the Commanding Officer at Camp Davis, and that his deposition be taken, if the defendant shall require such deposition, and the plaintiffs, in open Court, waive all formalities as to the taking of the said deposition."

* * *

The Supreme Court of North Carolina dismissed the appeal without prejudice to renew the motion and on technical grounds. The reason for our calling this case to the attention of this Court is to demonstrate that the North Carolina courts do not place a true construction on the Soldiers' and Sailors' Civil Relief Act of 1940 and honor the Act in the breach.

V.

Other Pertinent Cases on the Act.

In *Lanham, et al.* v. *Cline,* 44 F. Supp. 897 (D. Idaho 1942), plaintiffs sued A and B for damages arising out of an automobile collision. Plaintiffs stated that they would seek relief only against A as B was in the armed forces and had requested the relief provided by the Soldiers' and Sailors' Civil Relief Act. The Court stayed the proceedings in the case even as against A, who was not in the military forces. But in *Swiderski* v. *Moodenbaugh,* 44 F. Supp. 687 (D. Oregon, 1942) an action was brought against a soldier for injuries sustained by plaintiff in a collision with a car driven by defendant-soldier. The action was brought when defendant was out of the service and he attended the pretrial conferences and his deposition was taken as an adverse witness while he was on inactive duty (to all practical purposes a civilian). The trial was delayed, but the case was finally called for trial when the defendant was back on active duty. Plaintiff agreed to limit his recovery to the casualty insurance policy carried by defendant and further not to seek a personal judgment against defendant. The

court, thereupon, allowed the trial to proceed and denied the motion of defendant for a postponement of further action.

See *Korsch* v. *Lambing*, 28 N. Y. S. (2d) 167 (1941) where the stay was granted because defendant was in the service and was a necessary witness to the defense. See also Annotations in 130 A. L. R. 774, 137 A. L. R. 451, 140 A. L. R. 1509, 141 A. L. R. 1515, 142 A. L. R. 1514.

In *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb., 1942) the court said in granting a motion to stay the proceedings stated at p. 743:

> "But here the statute seems to be imperatively controlling both as to the necessity for the stay, 50 U. S. C. A. Appendix § 521, and for practical purposes, as to its duration, 50 U. S. C. A. Appendix § 524. By Sec. 524, it is provided that 'Any stay of any action * * * ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period * * *'. It is true that the language is permissive. But it is likewise obvious that it reflects an instructive legislative policy to place the person engaged in the military establishment beyond the effect of the urgencies and uncertainties of pending litigation, and to allow him a reasonable period following his discharge to reorient himself with a view to the trial of his cause. So, if a continuance is in order, there would seem to be a rather clear congressional intimation that in the ordinary case it should be granted in general terms for the duration of the applicant's service and three months thereafter.' It is presently impracticable to attempt to limit stays, except in extraordinary cases, to 'any part of such period.'
>
> "Section 521 deals with the conditions under which a stay of proceedings will be allowed. It provides that: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its

own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'

"In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered that, circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of a stay mandatory, 'unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.

"No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful, or the showing made in furtherance thereof persuasive.

The Soldiers' and Sailors' Civil Relief Act of 1940 (in like manner with all similar previous acts in our history) was prompted by at least two considerations, first, the maintenance in the armed forces of a reasonable measure of that unbothered serenity and security in respect of personal responsibilities which effectively promotes military efficiency and the national defense; and secondly, the assurance that in the field of individual justice no advantage in judicial proceedings by or against a soldier or sailor will result from his absorption in his country's defense.

The soldier or sailor in seasons of war has neither time nor mental aptitude for litigation. Without unnecessary discussion, it may simply be stated that while the Act recognizes that in some instances 'the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service,' such instances will be relatively rare. And the court is not made aware of any circumstances

upon which it may be concluded that this is one of them.

There is nothing novel either in the legislation which the defendant now invokes, or in the policy of the judicial and social indulgence towards the absent soldier. Only presumption would impel a judge, in a memorandum of this character, to assemble from legal and general literature the abundant examples of the latter grace. And as to the former, it will be sufficient merely to mention the numerous statutes enacted during the Civil War upon the point (vide: 13 C. J. 143, Title, Continuances Sec. 42(2), Note 68 and cases cited; 17 C. J. S., Continuances, § 30) and the more recent Soldiers' and Sailors' Civil Relief Act of 1918, 50 U. S. C. A., Appendix § 101, *et seq.*, especially Secs. 112 and 115. It may be granted that a continuance will probably operate at least temporarily and perhaps permanently to the disadvantage of the plaintiff. That result is unfortunate. But it is a reasonable exaction by society from one of its members for its own preservation; a proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to 'provide for the common defense.'"

VI.

Denial of Due Process.

Independent of statute, as an incident to their authority to hear and determine causes, courts may grant continuances on a basis of sound discretion. Mr. Justice Day in *Franklin* v. *South Carolina*, 218 U. S. 161, at page 168, points out that the action is not ordinarily reviewable and that "it would take an extreme case to make the action of the trial court in such a case a denial of due process of law."

We submit that the facts in the case at bar are the extreme case and thus make the refusal to grant a continuance by the trial court a denial of due process of law within the words of Mr. Justice Day.

Without referring to the 1942 amendments to the Soldiers'

and Sailors' Civil Relief Act of 1940, which clearly confers the benefits of the Act upon United States citizens serving with our Allies, the Supreme Court of Ohio in *State ex rel. Buck* v. *McCabe, et al.*, 140 Ohio St. 535, 45 N. E. (2d) 763, sustained a continuance of a case brought against a defendant in the military service of the Dominion of Canada. Plaintiff contended that the trial court abused its discretion in granting the continuance to the absent defendant and the Ohio court determined that such was not the case. How much more should we protect members of our own armed forces.

The basis for a continuance of an action rests upon the right of a party to have a reasonable opportunity to be present and to be heard at the trial of his cause upon the merits. True, the absence of the party must be unavoidable and not voluntary. One subject to military orders does not have the freedom to come and go as he pleases, nor does he have the free opportunity of taking annual leave on a leave slip nor does he "dare" take the risk of being absent from duty on the flimsy excuse of a "headache". "His service is continuous day and night; his movements are governed by orders and commands, by military law * * *" is stated in *Jones* v. *United States*, 60 Ct. Cls. 552 (1925) as reasons for concluding that amounts received as commutation of quarters are to be excluded from gross income.

The trial court on the evidence before it in this case was arbitrary and capricious in refusing to grant the continuance to the petitioner and even if there were no Soldiers' and Sailors' Civil Relief Act, petitioner should have been granted a continuance.

VII.

Petitioner Entitled To Day In Court.

It is clear that a reversal of the state court by this Court will not affect any of the rights of the plaintiffs in the lower court. The bona fides of the petitioner is clearly demonstrated by his deposit of the subject matter of the "trust" in litigation with the Clerk of the trial court, and no loss can result to plaintiffs from this aspect (R. 45). The day of reckoning for the parties is merely delayed and at some future time both sides will have a day in court. Up to this time petitioner has not had an opportunity for his day in court because of his active military service. In the words of Judge Schmuck in *McGlynn* v. *McGlynn*, 35 N. Y. S. (2d) 6, at page 7, "every inhibition must be deferred so that he is physically, mentally and spiritually free to devote himself to the greatest task ever to confront him and his country".

We ask this Court only for the right to have a day in court.

CONCLUSION.

An army officer on active military duty and entitled to the relief of the Soldiers' and Sailors' Civil Relief Act of 1940 is denied a continuance of a case in which he is the defendant. The trial court summarily concludes that the army officer's ability to defend is not materially affected by such military service and proceeds to grant a personal judgment against such army officer despite the fact that (1) local counsel for the army officer cannot participate in the trial because he, too, has reported for active military duty just twelve days before the trial, (2) the army officer is several hundred miles away and cannot get leave except in serious emergencies, (3) affidavits are submitted by such army officer and his local counsel and a

request for a continuance is made, (4) no proof is submitted by anybody that such army officer can conduct his defense and that his ability is not materially affected by military service, (5) such army officer has a defense to the serious and personal charges made against him, and (6) a substantial sum of money is involved.

The relief afforded by the Soldiers' and Sailors' Civil Relief Act should not be so lightly brushed aside by any court. Our country is at war and the morale of the members of the armed forces must be sustained. That is part of the battle on the home front. Yet the North Carolina courts, in this case, have paid homage to the act by merely noting its provisions. There is not a scintilla of evidence in the record to justify the treatment accorded petitioner in the state courts.

It is petitioner's contention that the statutory continuance allowed him by the Act placed the burden of proving his ability to defend was not materially affected by his military service squarely on those who opposed the continuance. No evidence was submitted by the other side. Perhaps it was unnecessary because the trial judge seems to have moved on his own initiative. Such treatment to a soldier of the United States by state courts will not be allowed, we trust, so long as this Court sits.

We submit that a failure to reverse the state courts will place this Court's stamp of approval on the treatment accorded petitioner which will have deleterious effects on the morale of the members of our armed forces. Such adverse news will spread throughout the entire Army and Navy here and abroad and will create a disturbance of mind in the men away from home that they are not secure in their rights and property.

The Soldiers' and Sailors' Civil Relief Act cannot be frittered away so easily by mere words of a trial judge.

We submit that the Court should reverse the state courts and give full effect to the Act passed by the Congress as

part of its war legislative program to end that justice may be done directly to a member of the armed forces and indirectly to the millions of men and women who are fighting on every front.

Respectfully submitted.

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APPENDIX.

Pertinent Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940.

54 STAT. 1178

Section 101. ---

"(1) The term 'persons in military service' and the term 'persons in the military service of the United States,' as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service,' as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

* * * * * * * * * *

"(3) The term 'person,' when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association."

* * * * * * * * * *

"(4) The term 'court,' as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

* * * * * * * * * *

Section 200. * * *

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized at-

torney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."

• • • • • • • • • •

Section 201.

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

• • • • • • • • • •

Section 205.

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

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FEB 25 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 698

DANIEL F. BOONE,

Petitioner,

vs.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE AND MARTHA PENELOPE BOONE, A MINOR REPRESENTED IN THIS PROCEEDING BY HER NEXT FRIEND, W. C. HAGUE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

M. R. McCOWN,
Counsel for Respondents.

J. E. SHIPMAN,
Of Counsel.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents respectfully submit to your honorable court the following brief in opposition to the petition for a writ of certiorari:

Statement of Matter Involved.

This action was commenced by the respondents against the petitioner in the Superior Court of Polk County, North

Carolina, by a summons duly issued June 21, 1941, and personally served upon the petitioner on June 23, 1941 (R. 1-2).

In their complaint the respondents sought an accounting and declaration of the terms of the trust fund referred to therein and expressed apprehension of the safety of the fund and sought the oversight of the court to safeguard and protect the rights of the minor beneficiary (R. 3-8). The petitioner in apt time answered admitting the receipt of the fund and promising when he "has a little time" to have a statement made up disclosing the status of the fund, and further alleged that he changed his residence from the State of North Carolina to Washington, D. C., on June 23, 1941, the day service was made on him, and that the North Carolina court did not have jurisdiction of the trust (R. 24-36). The petitioner in his answer alleged a purported declaration of trust executed by Clarence A. Lightner, and took the position that under said declaration he was not accountable to the court for the manner in which he discharged the trust.

The respondents replied to this further defense set up in the answer and alleged that at the time said paper writing was purported to have been executed, the said Clarence A. Lightner was without mental capacity to execute the same (R. 36-38).

The deposition of the petitioner on his own behalf was taken in Washington, D. C., at his instance, on August 15, 1941, at which time he was represented by Clifford M. Toohy, Esq., of Detroit, Michigan (R. 52). On November 3, 1941, the deposition of David S. Patterson was taken in New York on behalf of the respondents, and the petitioner attended in person and was represented by counsel (R. 52-53).

On November 5, 1941, certain depositions were taken in New York on behalf of the petitioner, and in addition to local

counsel representing the petitioner Mr. Toohy was also present, as was the petitioner (R. 53-54).

The cause regularly came on for trial at the January-February, 1942 term of Polk County Superior Court, and the petitioner moved for a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act. His attorney, Major Roy L. Deal, who made and argued the motion for the continuance, then stated to the court: "That he expected to be called in the service in the United States Army, and that he would be unable to try the case", and requested that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel (R. 40-41). An order was made granting the motion and transferring the cause from Polk County Superior Court to Henderson County Superior Court, and peremptorily setting the case for trial on May 25, 1942, and a copy of this order was certified to the Adjutant General of the United States Army (R. 49-50). When the matter was reached in accordance with this order in Henderson County Superior Court on May 25, 1942, a further motion for a continuance was filed in petitioner's behalf based on the Soldiers' and Sailors' Civil Relief Act, which motion was supported by the affidavits of petition (R. 55), and of Major Roy L. Deal (R. 58-59). In opposition to this motion, the respondents presented to the court the entire record consisting of the pleadings, the depositions which had been taken on behalf of both the petitioner and respondents, and the statement of receipts and disbursements filed that day by counsel then appearing for the petitioner (R. 51-55). They further called the court's attention to the provision in the order made by the court at the January-February, 1942, term of Polk County Superior Court requiring the Clerk of the Court to certify a copy of that order to the Adjutant General of the United States Army "who shall, if he deems it necessary, submit it to such of his subordinates or

superiors of the said Captain Boone as he may deem proper" (R. 50), and we particularly direct the court's attention to the absence of any statement in the petitioner's affidavit that he endeavored to procure a leave of absence and failed to obtain one. The motion for continuance was denied and the findings and opinion of the trial judge are set forth in the order (R. 59), and judgment (R. 39). The court found as a fact "that the Honorable Roy L. Deal at the January-February Term, of the Superior Court of North Carolina, in Polk County, in open court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal was expecting to be called into the military service immediately, and that it therefore would be necessary for the defendant to procure additional legal counsel" (R. 59-60). The court further found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case, and that his military service has not prevented him from doing this" (R. 41).

After fully considering the affidavits for the motion, and the record in opposition, and after argument by counsel representing all parties, the court expressed the opinion and found as a fact "that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation" (R. 59).

Counsel then representing the petitioner withdrew, and the trial proceeded in the absence of the defendant and of any counsel representing the defendant (R. 61), and after issues were submitted to the jury and answered as shown, the judgment was entered (R. 39). The firm of Williams and Cocke, of which firm Mr. R. R. Williams is a member, and who appeared and argued the motion for a continuance, appeared and entered an appeal for the petitioner to the Supreme Court of North Carolina. In due course the Supreme Court

of North Carolina rendered an affirming opinion (R. 199-204).

Questions Presented.

1. Where the petitioner failed to raise in the Supreme Court of North Carolina, by exception duly taken, the question that there was no evidence to support the trial court's finding of facts upon which the order denying petitioner's motion for a continuance was based, can said question be raised for the first time by application for writ of certiorari in the Supreme Court of the United States?

2. Under the provisions of the Soldiers' and Sailors' Civil Relief Act, and under the facts shown by the record, is the question of continuance discretionary with the trial court?

Reasons for the Disallowance of the Writ.

It is respectfully submitted that the petition for a writ of certiorari should be denied for the following reasons:

1. For that there is no merit in the position of the petitioner that there was no evidence to support the court's finding of facts upon which the order denying the continuance was based, and for the further reason that the exception made thereto comes too late.

2. For that the trial judge was presented with a discretionary motion when petitioner applied for a continuance under the Soldiers' and Sailors' Civil Relief Act, and the facts fully justify and support the conclusion and action of the trial judge.

Argument.

POINT 1.

The record discloses that the respondent in his appeal to the Supreme Court of North Carolina made no point to the

effect that there was no evidence to support the findings of the trial court upon which the order denying the motion for a continuance was based, and no exception on this question appears in the record. It is elementary that the Supreme Court of North Carolina cannot grant relief to an appellant on the ground that there was no evidence, unless objection is made and exception taken in apt time in the trial court. As no objection was made or exception taken in this regard in the trial court, this question could not be reviewed or passed upon by the State Supreme Court, even if the petitioner had presented the same by argument or brief. However, it appears that the question was not presented in any manner whatsoever to the Supreme Court of North Carolina, and we submit that it is now too late for the petitioner to present it to this court. Furthermore, we think the record discloses full and ample evidence to support the finding of facts of the court below, and if the point now presented had been raised in proper time, it could not have been sustained. The petitioner based his motion for a continuance principally upon his own affidavit, and the conduct of the petitioner with respect to this case from the time of its institution until the trial was concluded in the Supreme Court of North Carolina, was such that the court could not give credence to his affidavit. Under the law the court was the sole judge of the weight to be given the affidavit of the petitioner, as well as any other affidavits that he may have introduced, and it is clearly apparent from the record that the affidavits offered by the petitioner were not convincing, and the petitioner's motion was therefore denied.

Penland v. *Hospital*, 199 N. C. 314;

Lane v. *Paschall*, 199 N. C. 364;

Tyson v. *Tyson*, 100 N. C. 360, at bottom of page 368;

Ferrell v. *Metropolitan Life Insurance Company*, 208 N. C. 420;

Harrison v. *Metropolitan Life Insurance Company*, 207 N. C. 487;
Lawrence v. *Hester*, 93 N. C. 79.

POINT 2.

The allowance of petitioner's motion for a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act was discretionary with the trial judge.

It is respectfully submitted that the preceding paragraph is a correct statement of the law. In petitioner's argument (page 17) it is said that the issue is joined on the proper construction of the words:

> "Unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service."

The respondents agree that the pivotal point is involved in the language quoted. It is respectfully submitted that the trial court had ample facts presented in opposition to the motion to support his findings and that the findings were ample, and in fact that no other conclusion could have been reached. The petitioner further says in his brief that this court should read the record in order to determine whether there was evidence to sustain a finding by the trial court that the ability of the petitioner to conduct his defense was not materially affected by his military service. We respectfully submit that the facts set forth in the record, as referred to above, fully sustain the finding of facts by the trial court.

The respondents contend that the defendant had ample time and opportunity from June 23, 1941, when the service was made upon him, to prepare and present a defense, if he had one. It is clear from the record that he employed a number of able attorneys to represent him, and when he filed his report, he set forth eight items therein aggregating

$1042.73 representing payments made by the petitioner in *preparing* his defense in this action. It is most significant, we submit, that the petitioner, who is also an attorney, and admitted to practice before this court, should make an affidavit in support of a motion for a continuance without setting forth therein the important fact that he had applied for a leave of absence, and that his application had been denied. In the order of the trial court made at the January-February term, 1942, of Polk County Superior Court, the trial judge was painstaking and careful enough to have the Adjutant General of the United States Army notified officially and furnished a copy of the order showing that the case would be tried on May 25, 1942. In view of this official notification, the petitioner should have felt that a leave of absence would be granted, if requested, and if he had applied for such leave of absence and the same had been denied, it may be conclusively inferred that he would have so stated in his affidavit and that he would have supported said affidavit with the affidavit of a superior officer to the effect that his application for a leave of absence had been refused. The record discloses that the defendant attended the taking of depositions in New York on November 3rd, and November 5th, 1941, and he evidently obtained a leave of absence for this purpose.

In addition to the time which had elapsed from the commencement of the case to the date of the trial, and the nature of the charges made against the petitioner, and the omission from his affidavit of a statement showing an effort to obtain a leave of absence, the trial court also had the benefit of facts which were altogether convincing and conclusive that the petitioner had not made any effort whatsoever to be present at the trial, and that his reason for not being present was because of his dereliction of duty in discharging the trust involved in the litigation. On page 69 of the Record, the deposit of the trust fund amounting

to $15,449.10 is shown. The checks showing the withdrawals from this account by the petitioner to the order of his brokers (R. 135-13[illegible]) correspond with the debits to the bank account and the credits on the broker's account. The exhibits attached to the deposition of David S. Patterson fully disclose the petitioner's speculations with the trust fund (R. 83-115). The oath of the petitioner in verifying his answer "that he has handled this fund as a reasonably prudent man would have handled it; that he has used his best judgment and good faith in this matter; that he has not dissipated one penny of the fund, nor has he made any withdrawals from the fund since the day the money was turned over to him" (R. 31), and his statement of receipts and disbursements (R. 51-55) are in such conflict with the record of the bank account and of the broker, that no further comment should be necessary. We therefore submit that the conduct of the petitioner in this case is altogether inconsistent with the conduct of a defendant who is interested in the preparation of his defense, and in the trial of his cause. If he had had confidence in his defense and had been interested in sustaining it, he would not only have shown by conclusive evidence that he could not obtain a leave of absence from the proper authorities, but he would have used every effort to be ready, regardless of whether or not he could be personally present. He knew that Major Deal would not be in position to try the case, and he therefore had ample opportunity between February 2nd, and May 25th, to have employed counsel to ably represent him. He had his own deposition and the deposition of other parties upon which he relied to rebut the evidence of the plaintiffs, here the respondents, and we submit that if he had acted in good faith and believed in his defense, he would have been ready to have tried the case and would have had able lawyers employed to represent him. He

chose, however, to employ a firm of attorneys of Asheville, North Carolina, which is a firm of recognized ability, to represent him only for the purpose of obtaining a continuance, and then when his motion was denied, these attorneys withdrew from the case, but after the case had been tried and the judgment signed, the same attorneys appeared before the court and prayed an appeal to the Supreme Court of North Carolina. It is therefore clearly apparent that the petitioner did not want to try the case, and was seeking a continuance for the purpose of delay only, and that his conduct and attitude shows clearly that in his attempt to obtain a continuance he was merely trifling with the court.

There can be no question that if the petitioner had been acting in good faith that the attorneys who made the motion for the continuance and prayed the appeal would have been employed to stay with the case throughout the trial. Having no confidence in his defense, however, he pursued the tactics shown by the record with the hope that he would be granted relief under the Soldiers' and Sailors' Civil Relief Act.

We respectfully submit that the provisions of the Act were designed to prevent such abuse and that for this reason the court is vested with a sound discretion by the terms of the act. While the Act is intended to protect the rights of those in military service, it should be observed that the rights of creditors have not been overlooked. The provisions were intended to be fair and evenly balanced. It declares no general moratorium on debts and places no hindrance in the way of the commencement of actions against men in the military service. It provides no exemptions from the service of process. These are not the methods of relief provided, but the relief consists in suspending proceedings once they are begun. *But as a condition precedent to any action by the court, it must be made*

to appear that the ability of the soldier to discharge his obligations has been materially affected by reason of his military service. If, in the opinion of the court, the ability of the defendant to conduct his defense, if he is in the military service, is materially affected by such service, the Court is required to grant a stay of proceedings. In support of this position we cite the following:

In 130 A. L. R. 774, is an annotation of the Soldiers' and Sailors' Civil Relief Act, and on page 784, it is said:

> "The application of the remedies which the Soldiers' and Sailors' Civil Relief Act affords is left largely to the discretion of the trial court, and in the absence of a showing of an abuse of such discretion, the decision of such courts will not be disturbed."

See also *Swiderski* v. *Moodenbaugh,* 45 Fed. Supplement, 790, where Honorable James Alger Fee, said:

> "The statute indicates that the discretion of the trial Court is absolute and without review."

The opinion of the Supreme Court of North Carolina in this case was written by Stacy, Chief Justice, and filed November 4, 1942, and is reported in Volume 222, page 205, of the North Carolina Supreme Court reports. Prior to what is stated therein with respect to the act in question, the Chief Justice made the following observation pertaining to the duties of courts of equity to safeguard trust funds and particularly those of minors, viz:

> "When the trial court was last called upon to stay proceedings herein under the Soldiers' and Sailors' Civil Relief Act of 1940, he was faced with defendant's report, filed that day with the Clerk of the Superior Court of Henderson County, showing the trust account to be in a precarious condition. Eight items therein, aggregating $1042.73, represented payments made by the defendant in preparing his defense in this action.

Moreover the admission in defendant's answer that he was 'not managing said fund pursuant to any directions in the will of Frances M. Lightner', and the allegation that he was proceeding under ante mortem instructions from Clarence A. Lightner, which the plaintiffs challenged because of alleged incapacity of the maker, were sufficient to put the court on notice and inquiry respecting the status of the fund in suit. The court observed: 'From (fol. 202) the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense'. It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. Carter *v.* Young, 193 N. C. 678, 137 S. E. 875. As said by Merrimon, J., in Albright *v.* Albright, 91 N. C. 220, 'However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the cestui que trust, the court will promptly interpose its protective authority.' See Young *v.* Hood, 209 N. C. 801, 184 S. E. 823; Heyer *v.* Bulluck, 210 N. C. 321, 186 S. E. 356, and cases there cited."

The court then after quoting Sections 201 and 200 of the Soldiers' and Sailors' Civil Relief Act of 1940, wrote a very brief opinion, which we quote in full in so far as it relates to the Act in question, and which we are persuaded states the proper interpretation and construction of the Act.

"It was the opinion of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service. The judgment recites a factual finding 'that the defendant has had ample time and opportunity properly to prepare his defense in this case and that his military service has not prevented him from doing this. • • • His failure properly to handle the (fol. 203) trust fund or to account for the same has not been

affected in any way by reason of his military service'. Indeed, the trial court was strongly convinced of the necessity of prompt action on the part of the court of equity to protect the fund in suit. He permitted the defendant to use the Act of Congress as a shield, and declined to permit him to use it as a sword. In this, we think, the trial court pursued the intent of the statute. Pope *v.* U. S. Fidelity & Guaranty Co., 20 S. E. (2d) (Ga. App.) 618; Jamaica Sav. Bank *v.* Bryan, 175 Misc. 978, 25 N.Y.S. (2d) 17; Annotation, Soldiers' and Sailors' Civil Relief Acts, 130 A. L. R. 774.

Speaking to a similar situation in the Pope Case, supra, Sutton, J., delivering the opinion of the Court, said: 'So, it will be seen that a person in the military service is not entitled to a stay of a judgment against him as a matter of law under the provisions of the act of Congress just referred to, where in the opinion of the court passing on the matter the ability of such person to comply with the judgment is not materially affected by reason of his military service; nor is such person entitled to a stay of a proceeding against him, merely by virtue of said act, unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his military service.'

To like effect is the declaration of the Circuit Court of Appeals, Sixth Circuit, in the case of Royster *v.* Lederle, 128 F. (2d) 197: 'The object of the Act was to prevent injury to the civil rights of those in the armed services of the United States during that service in order that they would be free to devote all of their energies to the military needs of the Nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable.' See, also, Swiderski *v.* Moodenbaugh, 45 F. Sup. 790.

Nor was it error for the court to proceed without appointing an attorney to represent the defendant. Such is the requirement only 'if there shall be a default of any appearance by the defendant'. Here, there was no default of any appearance by the defend-

ant. He had duly filed answer. Depositions had been taken. His counsel appeared at the January-February Term, 1942, and moved for a continuance. This was granted, apparently upon satisfactory (fol. 204) terms. The defendant again appeared through counsel at the May-June Term, 1942, and moved for a continuance. It is true, counsel then announced that he appeared 'for the sole purpose of moving for a continuance'. Nevertheless, the appearance was general, and the court was presented with a discretionary matter."

Summary and Conclusion.

It is respectfully submitted that the facts as set forth in the record clearly show that this case has been correctly decided, and that the conclusion of the trial court as approved and affirmed by the Supreme Court is without error.

Respectfully submitted,

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Tryon, North Carolina,
Counsel for Respondents.

Of Counsel:
J. E. Shipman,
Hendersonville, N. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 698

DANIEL F. BOONE,

Petitioner,

vs.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE AND MARTHA PENELOPE BOONE, A MINOR REPRESENTED IN THIS PROCEEDING BY HER NEXT FRIEND, W. C. HAGUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR RESPONDENTS.

J. E. SHIPMAN,
Of Counsel.

M. R. McCOWN,
Counsel for Respondents.

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BRIEF FOR RESPONDENTS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents respectfully submit to your honorable court the following brief:

Statement of Matter Involved.

This action was commenced by the respondents against the petitioner in the Superior Court of Polk County, North Carolina, by a summons duly issued June 21, 1941, and

personally served upon the petitioner on June 23, 1941 (R. 1-2).

In their complaint the respondents sought an accounting and declaration of the terms of the trust fund referred to therein, and expressed apprehension of the safety of the fund and sought the oversight of the court to safeguard and protect the rights of the minor beneficiary (R. 2-7). The petitioner, on August 5, 1941, answered, admitting the receipt of the fund and promising when he "has a little time" to have a statement made up disclosing the status of the fund and further alleged that he changed his residence from the State of North Carolina to Washington, D. C., on June 23, 1941, the day service was made on him, and that the North Carolina court did not have jurisdiction of the trust (R. 20-30). The petitioner in his answer alleged a purported declaration of trust executed by Clarence A. Lightner, and took the position that under said declaration he was not accountable to the court for the manner in which he discharged the trust.

The respondents replied to this further defense set up in the answer and alleged that at the time said paper writing was purported to have been executed, the said Clarence A. Lightner was without mental capacity to execute the same (R. 31-32).

The deposition of the petitioner on his own behalf was taken in Washington, D. C., at his instance, on August 15, 1941, at which time he was represented by Clifford M. Toohy, Esq., of Detroit, Michigan (R. 44). On November 3, 1941, the deposition of David S. Patterson was taken in New York on behalf of the respondents, and the petitioner attended in person and was represented by counsel (R. 44).

On November 5, 1941, certain depositions were taken in New York on behalf of the petitioner, and in addition to

local counsel representing the petitioner Mr. Toohy was also present, as was the petitioner (R. 44).

The cause regularly came on for trial at the January-February, 1942 term of Polk County Superior Court, and the petitioner moved for a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act. His attorney, Major Roy L. Deal, who made and argued the motion for the continuance, then stated to the court: "That he expected to be called in the service of the United States Army, and that he would be unable to try the case", and requested that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel (R. 34). An order was made granting the motion and transferring the cause from Polk County Superior Court to Henderson County Superior Court, peremptorily setting the case for trial on May 25, 1942, and a copy of this order was certified to the Adjutant General of the United States Army (R. 41-42).

When the matter was reached in accordance with this order in Henderson County Superior Court on May 25, 1942, a further motion for a continuance was filed in petitioner's behalf based on the Soldiers' and Sailors' Civil Relief Act, which motion was supported by the affidavits of petitioner (R. 46), and of Major Roy L. Deal (R. 48-49). In opposition to this motion, the respondents presented to the court the entire record consisting of the pleadings, the depositions which had been taken on behalf of both the petitioner and respondents, and the statement of receipts and disbursements filed that day by counsel then appearing for the petitioner (R. 42-46). They further called the court's attention to the provision in the order made by the court at the January-February, 1942, term of Polk County Superior Court requiring the Clerk of the Court to certify a copy of that order to the Adjutant General of the United

States Army, "who shall, if he deems it necessary, submit it to such of his subordinates or superiors of the said Captain Boone as he may deem proper" (R. 42), and to the absence of any statement in the petitioner's affidavit that he endeavored to procure a leave of absence and failed to obtain one.

The motion for the continuance was denied, and the findings and opinion of the trial judge are set forth in the order (R. 49), and judgment (R. 33). The court found as a fact "that the Honorable Roy L. Deal at the January-February Term, of the Superior Court of North Carolina, in Polk County, in open court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal, was expecting to be called into the military service immediately, and that it therefore would be necessary for the defendant to procure additional legal counsel" (R. 50). The court further found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case, and that his military service has not prevented him from doing this" (R. 34).

After fully considering the affidavits for the motion, and the record in opposition, and after argument by counsel representing all parties, the court expressed the opinion and found as a fact "that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation" (R. 50).

Counsel then representing the petitioner withdrew and the trial proceeded in the absence of the defendant and of any counsel representing the defendant (R. 51), and after issues were submitted to the jury and answered as shown, the judgment was entered (R. 33). The firm of Williams and Cocke, of which firm Mr. R. R. Williams is a member, and who appeared and argued the motion for a continuance,

appeared and entered an appeal for the petitioner to the Supreme Court of North Carolina. On November 4, 1942, the Supreme Court of North Carolina rendered an affirming opinion (R. 127-132), which is reported in 222 N. C. 205, 22 S. E. (2d) 426. This Court granted certiorari March 8th, 1943.

Questions Presented.

1. Under the provisions of the Soldiers' and Sailors' Civil Relief Act, and under the facts shown by the record, is the question of continuance discretionary with the trial court?

2. Can the petitioner now raise for the first time the question that there was no evidence to support the trial court's finding of facts?

3. Should the judgment of the lower court be reversed when it conclusively appears that the correct result has been reached?

Summary of Argument.

The argument of the respondents, briefly summarized, is,

(a), that under the provisions of the Soldiers' and Sailors' Civil Relief Act the trial court shall stay a proceeding against a person in military service *unless in the opinion of the Court the ability of the defendant to conduct his defense is not materially affected by reason of his military service;*

(b), that the facts in the case at bar fully warranted the trial court in reaching that conclusion and in denying petitioner's motion for continuance, and

(c), that a reversal of the ruling complained of could not benefit petitioner in a subsequent trial as the correct result has been reached.

ARGUMENT.

Point 1.

Under the provisions of the Soldiers and Sailors Civil Relief Act, a continuance is properly refused upon the finding of the trial court that the ability of the defendant to conduct his defense is not materially affected by reason of his military service.

The question involved in this case is the interpretation of Section 201 of the Soldiers and Sailors Civil Relief Act of 1940. 50 U. S. C. A. App. 521. The petitioner contends that in the trial court and in the Supreme Court of North Carolina this section was not properly construed, and the respondents contend to the contrary.

So far as our study has disclosed, this is the first case involving this act to reach the Supreme Court of the United States. There are a number of decisions from State courts and Federal courts dealing with the act, and most of these cases are mentioned and annotated in American Law Reports Annotated as follows:

130 A. L. R. 774; 137 A. L. R. 451;
140 A. L. R. 1509; 141 A. L. R. 1515;
142 A. L. R. 1514.

While none of these cases seem to be directly in point with the case at bar, we will discuss certain language used by the courts, after first considering the language of the Act itself.

In the case at bar, the decision must turn upon the proper construction of the words in Section 201 of the Act, that

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved * * * the court in which it is pending * * * shall, on application to it by such person or some other

person on his behalf, be stayed as provided in this Act, *unless, in the opinion of the Court the ability of • • • the defendant to conduct his defense is not materially affected by reason of his military service.*" (Italics ours.)

This language is unambiguous. It is clear that Congress did not intend to exempt those in military service from service of process, but clearly intended that suits could be commenced as usual, and vested the trial court with discretionary power to see that the rights of service men were protected. In plain language the Act says that the trial court shall stay the action unless it is the opinion of the court that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. It will thus be seen that Congress had in mind the rights of those who might bring actions against those in the military service. Unless Congress had specifically intended to protect the rights of those creditors and others who might have cause to sue a service man, the act would undoubtedly have been phrased in different language, and all suits against service men forbidden. Since the Act is not thus written, the courts should not determine that all actions in which a person in the military service is involved should be stayed upon application being made. If the legislative body had meant this it would have said so, and the italicized provision of the section above would not have been inserted.

We respectfully submit that the facts in the case at bar show with considerable force the wisdom of Congress in providing that some actions against men in the service should be stayed, and that others should be permitted to proceed, depending upon the factual finding of the trial court. To enlarge upon this thought calls for a discussion of the facts, and at the risk of being tedious, we will refer to them at some length.

It was apparent from the pleadings that trust funds belonging to a three year old infant were involved. The trial court, upon the trust being admitted by the defendant, immediately recognized the necessity for protecting the rights of the infant. Authority for this duty on the part of the court is hardly necessary, but in view of the contention of the defendant in his answer that the trust was not as contended for by the plaintiffs, and in order to show that the duty applies to all trust funds in which minors are beneficially interested, we will quote from the opinion of Judge Stacy:

> "It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. Carter *v.* Young, 193 N. C. 678, 137 S. E. 875. As said by Merrimon, J., in Albright *v.* Albright, 91 N. C. 220, 'However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the deteriment of the cestui que trust, the court will promptly interpose its protective authority.' See Young *v.* Hood, 209 N. C. 801, 184 S. E. 823; Heyer *v.* Bulluck, 210 N. C. 321, 186 S. E. 356, and cases there cited."

Having become cognizant of the subject matter of the case when it was reached on the trial docket at the January-February Term of Polk County Superior Court, the trial judge disposed of the defendant's motion for a continuance in the order set forth on the pages 41 and 42 of the record. The motion for continuance was allowed in the discretion of the court, although the court expressed the opinion "that it should at the earliest practical date ascertain the exact status of the trust fund referred to in the pleadings." It appears from the subsequent order of May 25, 1942 (R. 49) "that the Hon. Roy L. Deal, at the January-February term of Superior Court of North Carolina, in Polk County, in

open court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal, was expecting to be called immediately into the military service, and that therefore it would be necessary for the defendant to procure additional legal counsel." There was an intervening term of Henderson County court between the January-February term of Polk County Superior Court and the May-June term of Henderson County Superior Court, and it is a fair inference that the case was continued until the May-June term of Henderson County Superior Court and peremptorily set for trial on May 25th, 1942, in order to give the defendant ample time to procure other counsel. The court further provided "in order that the said defendant may be fully advised, and that his superior officers may be fully advised of the importance of the litigation in question, it is directed that the Clerk of the Superior Court of Polk County, State of North Carolina, shall certify a copy of this order and forward the same to the Adjutant General of the United States Army, War Department, Washington, D. C., who shall, if he deems it necessary, submit it to such of his subordinates or superiors of the said Captain Boone as he may deem proper" (R. 42). No exception was made to the part of the order continuing the cause and directing its removal to Henderson County, but all other parts of the order were excepted to (R. 42).

The facts which were presented to the trial judge when he considered the defendant's motion for a continuance at the January-February Term of Polk County Superior Court, and again at the May-June term of Henderson County Superior Court were not brought forward in the record in making up the case on appeal for the obvious reason that the defendant in making up the assignments of error did not then take the position, as he does now, that there was no evidence on which the court could make a factual finding that the ability of the defendant to con-

duct his defense was not materially affected by reason of his military service. The assignments of error on this point are Nos. one and two, pages 117 and 118 of the record, and no other assignments of error relate to the refusal of the trial court to grant the continuance. The complaint of the defendant in said assignments of error was that "the court failed to make a finding that the defense of the action by the defendant would not be hindered." This is clearly an attempt on the part of the defendant to change his position on this point, and we submit that it is now too late to present the question. It cannot be doubted that when both sides were heard when the motion was argued that certain facts were presented to the court, and this is indicated by the court "finding as a fact that the motion to continue is made after the defendant's refusal in one or more instances arising out of litigation respecting the subject matter and personnel involved in this action to appear in the courts of North Carolina, even on citation for contempt, that the defendant is not, upon the motion for continuance, acting in good faith" (R. 50), and further indicated by the court's direction that a certified copy of the order be transmitted to the Adjutant General of the United States Army.

Having made the point that it is now too late for the defendant to say that there was no evidence to support the findings of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service, we think the record discloses full and ample evidence to support the finding of facts of the court below, and if the point now presented had been raised in proper time it could not have been sustained. It is very obvious that the court was justified in concluding "that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is

exercising his assumed right under the act referred to above to avoid such determination" (R. 50). In his brief in the Supreme Court of North Carolina counsel for the defendant squarely took the position that it was the right of the defendant to so use the Soldiers and Sailors Civil Relief Act, and if the defendant saw fit he could wilfully and deliberately absent himself, and invoke the provisions of the Act. We do not think this is in keeping with the spirit or intent of the Act.

The communication by the court directed to the Adjutant General of the United States Army was an official communication. The defendant was fully advised of it. Being a Major, he must have known that upon proper request being made, leave would have been granted. But it negatively appears that he did not ask for a leave in that his unsupported affidavit was all that was offered to the court to the effect that he could not obtain a leave. Significantly absent from petitioner's affidavit is a statement that petitioner applied for leave and the application was denied. Can the Act be invoked where the soldier does not want to obtain leave? It may fairly be asked in the light of the record how could the court put any credence in his affidavit. In his answer, filed on August 5th, 1941, he swore "that he has handled this fund as a reasonably prudent man would have handled it; that he has used his best judgment and good faith in this matter; that he has not dissipated one penny of the fund, nor has he made any withdrawals from the fund since the day the money was turned over to him" (R. 26). The deposition of the defendant was taken in Washington, D. C., on August 15th, 1941, and it appears from page 52 of the record that the charge of the court reporter for taking this deposition was $66.00. While the deposition is not brought forward in the record, its length may be inferred by the charge made for taking the same, and certainly it cannot be suggested that the defendant

swore to facts inconsistent with his verified answer. The period of time involved was only ten days between the filing of the answer, and the taking of the deposition.

There can be no doubt about the fact that the trust fund of $15,449.10 was deposited in the Wachovia Bank & Trust Company of Winston-Salem, North Carolina, on January 6, 1939 (R. 58), nor can there be any doubt of the fact that when the balance in the bank account was only $15,658.83 the defendant issued the check marked Exhibit E to E. A. Pierce & Company for $3,498.00 (R. 105), and that the same was charged to the bank account on March 7, 1939 (R. 59). A further check to the same firm for $2,313.00 was issued by the defendant (R. 106), and charged to the account on March 9, 1939 (R. 79). In due course followed the checks for $1,100.00 (R. 107), and for $3,535.00 (R. 107), which were charged on April 7 and April 19th, 1939 respectively (R. 60). The record continues the transactions in detail.

It should be borne in mind that although the defendant was a trustee and therefore had a positive and personal knowledge of how the funds had been handled, that the true facts were not shown until brought to light by the plaintiffs. Instead the defendant followed the positive statements in his answer as above quoted with evasions to the effect "that the Polk County Court has no jurisdiction over his management of said fund for his minor daughter" (R. 24), and "that as soon as he is discharged as a patient at Walter Reed Hospital, Washington, D. C., and has a little time in which to engage a certified public accountant, that he plans to have a statement made up as previously stated in this pleading; defendant further alleges that he is at all times anxious to conduct the affairs of this fund in such a way that it will be for the best interests of his minor daughter, Martha Penelope Boone" (R. 26). The only report forthcoming is that shown on pages 42 to 46 of the record. In the light of the facts,

no comment should be necessary as to the accuracy of this report. It should be noted that eight items therein, aggregating $1,042.73, represented payments made by the defendant in preparing his defense in this action. The defendant has been almost too definite in the matter of keeping his expense items as contrasted to the indefinite way in which he kept account of the more important items of the trust. It should not be overlooked that he ended the report with the significant item "expenses incurred since Judge Sink's order of February 2, 1942, are not included in this statement."

The depositions which were before the judge when he passed on the motion for continuance further showed that when this action was brought on July 21, 1941, the defendant was still carrying a marginal account with his brokers with the stocks which he now says composed the trust pledged as security, and that on June 27th, 1941, he owed the brokers $6,744.26 (R. 90). After the action was commenced, he obtained delivery of the stocks which he turned over to the Clerk of the Superior Court of Henderson County, pursuant to the order of Judge Sink. In addition to the stocks so turned over there were delivered to petitioner by the brokers 100 shares of Packard Motor Car Company, and 100 shares of Greyhound Corporation (R. 91). There is no explanation as to why these additional shares were not a part of the trust fund. It should be noted that 100 shares of Greyhound stock was purchased on April 18, 1939, for $1,726.50 (R. 73), and 100 shares of said Greyhound stock was purchased on March 8, 1939 for $2,302.50 (R. 72), and that when the defendant filed his purported accounting the trust was charged with the higher amount, although all of the said Greyhound stock was received by him at the same time, and was purchased with the trust funds.

We respectfully submit that the facts are so clear that no further argument or comment is necessary. They tell their own story, and certainly the trial court who was the sole judge of the weight to be given the affidavit of the defendant was justified in putting no credence whatever in the statement that the defendant could not obtain a leave of absence to attend the trial.

As to the affidavit of Mr. Deal, he had already told the court in person that he could not appear further in the case, and that the defendant would have to procure other counsel.

Furthermore, we respectfully submit that the trial court could only reach the conclusion that the defendant had first attempted a defense by concealing the true facts, and had filed his answer and made his deposition in that effort, and that the true facts having been brought out by the depositions of Mr. Patterson and Mr. Alspaugh in so conclusive and irrefutable a manner, that the defendant could only conclude that the sanctuary of the Soldiers and Sailors Civil Relief Act was his only recourse. We respectfully submit that it is clear, in view of this record, that the defendant could not do otherwise in attempting to save his face than absent himself from the court, and that the trial judge was not mistaken in his conclusion that the defendant did not have a defense. Inasmuch as this conclusion was practically irresistible under the facts, how can it be said that his military service has deprived the defendant of that which he never had?

We respectfully submit that the positions taken in the foregoing argument are supported by the following authorities:

Ebert v. *Poston*, 266 U. S. 548, 69 L. Ed. 435; 45 S. Ct. 188, where it is said that the judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature therein expressed. If the con-

tention of the petitioner is to prevail, it would mean reading into the Act a provision that all actions against men in service must be stayed, irrespective of the findings of the trial court on the question that the ability of the defendant to conduct his defense is not materially affected by reason of his military service.

In 130 A. L. R. 784, it is said:

> "The application of the remedies which the Soldiers and Sailors Civil Relief Act affords is left largely to the discretion of the trial court, and in the absence of a showing of an abuse of such discretion the decisions of such courts will not be disturbed." (Citing cases.)

In the case of *Tulley* v. *Superior Court* (1941), 45 Cal. App. (2d) 29, 113 P (2d) 477, referring to the Soldiers and Sailors Civil Relief Act of 1940, it is said:

> "Under that statute or independent of that statute, the trial courts possess ample power to protect the rights of those in the military service of the United States. It is inconceivable that in a proper case, the trial court, upon a proper showing, would not grant a reasonable continuance to one engaged in military service to permit him to properly prepare his defense, and, if necessary, continue such case during the period of the defendant's foreign service."

In the annotation in 140 A. L. R. 1510, it is said:

> "And it was held in *Swiderski* v. *Moodenbaugh* (1942), 44 F. Supp. 687, that it was discretionary with the court whether or not to grant a stay, it being the duty of the court to exercise sound judgment to avoid injury to a soldier devoting himself to the service of his country, and on the other hand to prevent use of the shield for the protection of others not so devoted."

In that case the trial judge, Hon. James Alger Fee, at page 790, says:

> "The statute indicates that the discretion of the trial court is absolute and without review."

In the case of *Royster* v. *Ledderle*, from the Sixth Circuit Court of Appeals, decided in 1942 (128 F. (2d) 197):

> "The object of the Act was to prevent civil injury to the civil rights of those in the armed services of the United States during that service, in order that they would be free to devote all of their energies to the military needs of the nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the act is inapplicable."

Under this authority it may be doubted whether or not under the particular facts of the case at bar the provisions of the Soldiers and Sailors Civil Relief Act are available to the defendant, for the following reasons:

(a) That in the showing made by the petitioner to the court in his effort to obtain a continuance, there is an entire absence of any factual allegation or proof that the petitioner has a valid defense or that his rights will be prejudiced by a proceeding against him;

(b) That it may be doubted that the act applies to obligations incurred by a trustee as the result of a breach of his trust;

(c) That it is inconceivable that Congress intended to relieve persons in the military service of the United States of their duties incident to the trusteeship of property belonging to minors, and to permit the use of the act to avoid an accounting by a trustee where a *prima facie* case of breach of trust is submitted to the court.

As to the point that the trial court did not appoint counsel to represent the defendant after the withdrawal of his counsel upon denial of the motion for continuance, we respectfully submit that the opinion of the Supreme Court of North Carolina clearly disposes of this question for the reasons stated therein. To the same effect is the case of

Re Cool (1941), 19 N. J. Mis. R. 236, 18A (2d) 714, where the court said that the words "any appearance" meant an appearance in any one of several ways of making an appearance, and that a party's conduct, as well as other circumstances, were to be considered in determining whether he had actually appeared.

POINT 2.

Under any view the correct result has been reached, and therefore the petitioner has failed to show reversible error.

When we depart from the broad and abstract field which Congress intended to cover by the provisions of the Soldiers and Sailors Civil Relief Act of 1940, and narrow the case at bar to its true aspects under the facts disclosed by the record, we respectfully submit that a correct conclusion has been reached in the judgment of the trial court which was affirmed by the Supreme Court of North Carolina.

On the basis of mathematical calculation, the petitioner was only charged with those amounts which could be traced into his hands by the record. He was not charged with amounts which the record indicated might have been received by him. Under this record, would it be difficult to again obtain the same judgment against the petitioner? We respectfully submit that no other result could be reached. The petitioner admits the receipt of the money, and its trust character. The securities which he turned over to the court as trust assets were issued to him individually. (As to the liability of a trustee as affected by the fact that an investment was taken in his own name without indication of fiduciary capacity, see annotation in 106 A. L. R. 271.)

This rule has been announced in many decisions, and inasmuch as there seems to be no authority to the contrary, we will refer only to the following:

In the recent case of *Securities & Exchange Commission* v. *Chenery Corp.*, decided Feb. 1, 1943 (87 L. Ed. 411), Mr. Justice Frankfurter, writing for the court, says on page 416:

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering* v. *Gowran*, 302 U. S. 238, 245, 82 L. Ed. 224, 229, 58 S. Ct. 154. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

In the case of *Palmer* v. *Hoffman*, also decided on Feb. 1, 1943, 87 Law Ed. 427, Mr. Justice Douglas, writing for the court, says, beginning on page 431:

> "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. (Feb. 26, 1919) 40 Stat. 1181, c. 48, 28 U. S. C. A. 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."

In North Carolina the rule is stated in the case of *Cauble* v. *Southern Express Company*, 182 N. C. 448, 109 S. E. 267, as follows:

> "The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical

merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial he must incur additional expense, and if there is no corresponding benefit he is still the sufferer. Besides courts are instituted to enforce right and restraint and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit. (Citing Authorities.)

Surely, when this rule, which is both sensible and just, is applied to the facts in hand, there is nothing to be gained by granting a new trial."

To the same effect is *Foxman* v. *Haynes*, 218 N. C. 722, 12 S. E. (2d) 528:

> "This court will not review a ruling of the court below which the record shows could not have prejudiced the complaining party, even if erroneous."

In accord is *Rankin* v. *Oates*, 183 N. C. 517, 112 S. E. 32, where Chief Justice Stacy says:

> "A new trial will not be granted when the action of the trial Judge, even if erroneous, could by no possibility injure the appellant."

See also *Collins* v. *Lamp*, 215 N. C. 719, 2 S. E. (2d) 258; *Bateman* v. *Kramer Lumber Company*, 154 N. C. 248, 70 S. E. 474; 34 LRA NS 615.

There is in Georgia a line of decisions applying this rule in which the court uses the expression that "the facts demanded the verdict." *Lunsford* v. *Armour*, 20 S. E. (2d) 594, and cases cited.

A careful study of the answer filed by the petitioner shows the lack of a meritorious defense. It has been held that he was a resident of the State of North Carolina when this action was commenced (see *Boone* v. *Boone*, decided by the Circut Court of Appeals for the District of Columbia, on Nov. 30, 1942, in which additional time has been given in the Supreme Court of the United States for making application for a Writ of Certiorari), and the North Carolina courts had undoubted jurisdiction of the trust fund here involved. The principal defense urged in the answer is that the North Carolina court did not have such jurisdiction. The defendant was present in person in New York when the deposition of Mr. Patterson was taken, and therefore fully advised of the facts. If he is dissatisfied he can only blame himself, as the facts seem to be of his making. His failure to refute the facts argues "that failure of one to present a fact necessary to his cause, when within his power to do so, must be taken as conclusive that such fact does not exist." *Black* v. *Wright*, 31 N. C. 447; *Smith* v. *Kappus*, 218 N. C. 758, 12 S. E. (2d) 693. The respondents have made an earnest effort to obtain the truth and to present it to the court. We respectfully submit that all speculation about the truth has been eliminated, and that the record conclusively establishes the facts.

Conclusion.

The litigants in this case are the petitioner, who is a lawyer admitted to practice in this Court, and the infant respondent, who is the beneficiary of the trust fund involved. Their respective rights depend on the facts in-

stead of on legal technicalities. The facts are free from doubt, and we therefore respectfully submit that the judgment complained of does substantial justice, and that under any view of the case the petitioner has not been deprived of any right.

Respectfully submitted,

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J. E. SHIPMAN,
Hendersonville, N. C.
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 698.—October Term, 1942.

Daniel F. Boone, Petitioner,
vs.
Clarence M. Lightner, Theodore A. Lightner, Mrs. Alice Lightner Hopf, et al.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[June 7, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

The federal question in this case is whether a stay of proceedings against a defendant in military service has been refused under circumstances which denied rights given by the Soldiers' and Sailors' Civil Relief Act of 1940. The controversy in which he was engaged is for state courts to settle, and we deal with the facts only as they relate to this federal question.

The petitioner Boone was summoned into a state court in North Carolina in an action to require him to account as trustee of a fund for his minor daughter, to remove him as trustee, to surcharge his accounts for losses caused by illegal management, and to obtain personal judgment for deficiency in the fund.

Boone's mother-in-law, by will of which he was executor and trustee, created a trust fund for the education of her grandchildren, including one child of Boone's. Shortly after her death, and in September, 1938, another child was born to him. Since this child was unprovided for in the will the father-in-law made arrangements which upon his death put into Boone's hands a fund of about $15,000. It is conceded that the fund was a trust for the benefit of the daughter. There was controversy whether it was governed, as Boone claimed, by a letter signed by the father-in-law which placed no restriction on his discretion; or, as Mrs. Boone, who has been sustained by the courts of North Carolina, claimed, by the same conditions as the testamentary trust set up by her mother. For our purposes it is enough that it was admittedly a trust and that grounds were alleged sufficient to move the state court to require an accounting.

The summons and complaint were served on Boone personally in North Carolina on June 23, 1941. He was then in military service of the United States as a Captain stationed in the office of the Under Secretary of War in Washington.

Boone filed a verified answer denying the jurisdiction of the court, claiming that on June 23, 1941, the same day the summons was served, he changed his "domicile and legal residence" to Washington, D. C., and his daughter's as well. He admitted receipt of the fund in trust, asserted the trust was governed by the letter referred to, and pleaded that he "is not bound to report to any Court." He denied all charges of misconduct of the fund, denied that there were grounds for apprehension that the funds were unsafe, and asserted that "he has exercised at all times good faith in caring for this fund." He also stated that "he has not dissipated one penny of the fund, nor has he made any withdrawal from the fund since the day the money was turned over to him." He pleaded at length facts to support his claim that he was no longer domiciled in North Carolina and to support his allegation that the trust was "a voluntary trust not subject to the jurisdiction of any court or restricted in any way by the terms of any will."

On February 2, 1942, the cause came on for hearing. Boone moved for a continuance to the 25th of May, 1942, his counsel, Roy L. Deal, stating that he expected soon to be called into service and would be unable to try the case, and asking the continuance in order to give defendant ample time to employ other counsel. The request was granted, and that date peremptorily set for the trial. The court forbade transfer of securities constituting the trust and required that on the trial date they and any funds of the trust be turned over to the Clerk of the Court to abide further orders. Its order admonished that the court would at the earliest practical date ascertain the status of the trust fund and that the presence of Boone himself at the trial "is highly desirable," but left to the discretion of Boone and his counsel whether it was necessary. In order, however, to advise defendant Boone and his superior officers of the importance of the litigation, the court directed that a certified copy of the order be sent to the Adjutant General of the United States Army at Washington.

When the trial day came, Boone invoked the Soldiers' and Sailors' Civil Relief Act of 1940, and demanded that the trial be continued until after the termination of his service in the Army or

until "such time as he can properly conduct his defense." At this time there were before the trial court not only the pleadings and the affidavits submitted by Boone and his counsel but also certain depositions which Boone had made and procured and which had been returned to the court, and also Boone's own statement of transactions which accompanied certain securities and funds which he turned over to the Clerk of the Court. Boone was not present, but counsel appeared for him to move for a further continuance under the Soldiers' and Sailors' Civil Relief Act. This motion was denied, counsel who had presented the motion withdrew from the case, and the trial proceeded. The verdict of the jury went against Boone; and judgment was entered that the trust was governed by the terms of the will, that Boone had been guilty of serious misconduct of the trust fund, and that he be held personally liable for the consequent loss to the trust fund of more than $11,000, and removed as trustee.

Boone then appealed to the Supreme Court of North Carolina, on the merits as well as on denial of the continuance, and that court affirmed. 222 North Carolina 205. As the decision below presented an important question of construction of the Act, we granted certiorari.

The section of the Soldiers' and Sailors' Civil Relief Act of 1940 principally invoked is § 201,[1] which reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The positions urged by petitioner come to these: first, that defendant's military service in Washington rendered a continuance mandatory; second, if not mandatory, that the burden of showing that he could attend or would not be prejudiced by his absence was not on him, but on those who would force the

[1] 54 Stat. 1178, 1181, 50 U. S. C. App. § 521.
We express no opinion on the question whether Boone could have the judgment opened upon proper application under § 200(4), 50 U. S. C. App. § 520(4).

proceedings; third, that the Court did not make the finding required by the Act for denial of a stay; and last, that in any view of the law the trial judge abused his discretion in this case. The petition raises other questions, including the constitutional one as to whether he has been denied due process of law, which we do not discuss because in the light of the facts of the case they are frivolous.

1. The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The Act of 1940 was a substantial reenactment of that of 1918. The legislative history of its antecedent shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act.[2] While this Court had no occasion to speak on the

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[2] As originally proposed, the Soldiers' and Sailors' Civil Relief Bill, S. 2859, 65th Cong., 1st Sess., provided in § 6 that:

"At any stage thereof any action or proceeding commenced in any court against a person in military service may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the defendant is not embarrassed by reason of his military service."

Accompanying "Notes as to the Provisions of the Bill" stated that a "sweeping exemption" such as that provided by most States in Civil War days, was "too broad, for there are many cases where the financial ability of soldiers and sailors to meet obligations in some way is not materially impaired by their entrance into service." Hearings and Memoranda before Senate Judiciary Committee on S. 2859 and H. R. 6361, 65th Cong., 1st and 2d Sess., p. 27.

Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that "a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs. There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves, and the court would say to them, 'No; your affair is a going concern; go ahead with the lawsuit. You have a lawyer, you have an agent, you have a corporation manager, and other things.'" *Id.* at p. 97.

As reported by the House Judiciary Committee, H. R. 6361, 65th Cong., 1st Sess., provided in § 201:

"That at any stage thereof any action or proceeding commenced in any

court against a person in military service during the period of such service or within 60 days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought is not materially affected by reason of his military service."

The House Report on this bill, No. 181, 65th Cong., 1st Sess., stated:

"Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against soldiers will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. Though not in military service, he may have property from which the income continues to come in irrespective of his presence; perhaps he may be some ne'er-do-well who only seeks to hide under the brown of his khaki; . . ." (p. 2.)

"The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. A total suspension for the period of the war of all rights against a soldier defeats its own purpose. In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit.

"But in any case a rigid stay of all actions against the soldier is too broad. There are many men now in the Army who can and should pay their obligations in full.

"On the other hand there are already tens of thousands of men in military service who will be utterly ruined and their families made destitute if creditors are allowed unrestrictedly to push their claims; and yet these same soldiers, if given time and opportunity can, in most cases, meet their obligations dollar for dollar. The country is asking 2,000,000 of its young men to risk their lives and, if need be, to give up their lives for their country. Before long even more will be asked to make the same sacrifice. Is it more than naked justice to give to the savings of these same men such just measure of protection as is possible?" (pp. 2-3).

"Section 201 illustrates how the committee has avoided an arbitrary, a rigid bill. The clause 'unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought, is not materially affected by reason of his military service,' is the key to the whole scheme of the bill. This mere fact of being in military service is not enough; military service must be the reason for the defendant not meeting his obligations." (p. 5.)

Congressman Webb, Chairman of the House Judiciary Committee, stated on the floor of the House, with reference to this bill, that:

"Heretofore during wars the various States have undertaken to pass the private stay laws for the benefit of the soldiers who are in the service of their country. If you will read the various laws of this kind which the committee has set out in its report, you will see what contrariety of such laws have been passed during recent years and during the various wars. The next material difference between this law and the various State laws is this, and in this I think you will find the chief excellence of the bill which we propose: Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even-handed justice between the creditor and the soldier, taking into consideration the fact that the soldier has been called to his country's cause, rests largely, and in some cases entirely, in the breast of the judge who tries the case.

"Manifestly, if this Congress should undertake to pass an arbitrary stay law providing that no creditor should ever sue or bring proceedings against

subject, the Act was generally construed consistently with this policy.[3]

Reenacted against this background without reconsideration of the question beyond a statement in the Senate Committee Report that "There are adequate safeguards incorporated in the bill to prevent any person from taking undue advantage" of its provisions,[4] we are unable to ignore or sterilize the clause which plainly vests judicial discretion in the trial court.

2. The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and

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any soldier while in the military service of his country, that would upset business very largely in many parts of the country. In the next place, it would be unfair to the creditor as well as to the soldier. It would disturb the soldier's credit probably in many cases and would deny the right of the creditor to his just debts from a person who was amply able to pay and whose military service did not in the least impair his ability to meet the obligation." 55 Cong. Rec. 7787.

On the floor of the Senate, § 201 was amended to substitute for "the ability of the defendant to comply with the judgment or order," "the ability of the defendant to conduct his defense," and to extend its protection to plaintiffs as well as to defendants. 56 Cong. Rec. 1696, 1753-1754. The amendments were agreed to in conference, with the managers stating with respect to the former amendment that "As the bill passed the House relief was to be given the party in military service unless his ability to comply with the judgment or order sought was not materially affected by such service. The amendment agreed on makes the test depend upon his ability to conduct the defense." 56 Cong. Rec. 3023. As so amended, the Bill became § 201 of the 1918 Act, 40 Stat. 442, which was carried into § 201 of the 1940 Act without amendment of the provision under consideration. While it is true that the discussion set forth in the preceding paragraphs related to a stay on a different basis than the one enacted, in so far as it deals with the question whether a mandatory or a discretionary stay was intended it is not made inapplicable or uninstructive by the amendment.

3 Davies & Davies v. Patterson, 137 Ark. 184; State *ex rel.* Clark v. Klene, 201 Mo. App. 408; cf. Swiderski v. Moodenbaugh, 44 F. Supp. 687, 45 F. Supp. 790; Dietz v. Treupel, 184 App. Div. 448; Gilluly v. Hawkins, 108 Wash. 79.

4 Sen. Rept. No. 2109, 76th Cong., 3d Sess., p. 2.

as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.

In the present case, whoever might have had the burden originally, the continuance was finally denied upon a record which disclosed the facts so far as either party saw fit to do so. The defendant and his counsel submitted affidavits and the depositions and accounts before the court revealed facts relevant to the issue.

Whether, if the court knew only the existence of this complicated controversy and that the defendant was absent in military service, it could have cast upon the defendant the burden of showing that the litigation could not go ahead without prejudice to him, is not before us. The court made no such ruling. The defendant appeared, he pleaded his defense, he took depositions showing fully what had happened to the fund, and he supplied his own affidavit showing where he was and what he was doing. Regardless of whether defendant was under a duty to make a disclosure of his situation, once he undertook to do so, the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. One of these is that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Cooper* v. *Dasher*, 290 U. S. 106, 109. The trial court and the Supreme Court of North Carolina did just this. They did not deny his stay because he failed to meet their ideas of burden; they weighed the evidence he offered and found its conclusions discredited by its avoidance of supporting facts within his knowledge and not within that of his adversary. That is not a ruling on burden of proof. Finding that the courts below have proceeded upon no misapprehension of the law, we turn to their dealing with the facts of the particular case.

3. Some question is raised as to whether the findings of the trial court meet the requirements of the Act. In the order denying the continuance it found as a fact that "the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the Act referred to above to avoid such determination." It also found the defendant "is not upon the motion for continuance acting in good faith." In the final judgment the court found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his military service has not prevented him from doing this." It found that "defendant had full opportunity to prepare and put in his defense if he had one," and that "It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride does not intend for this to be done."

Of course this is not a finding in the words of the statute that the ability of the defendant "to conduct his defense is not materially affected by reason of his military service," but there is no doubt that it was intended to be in substance the equivalent. It was so treated by the Supreme Court of North Carolina and to send the case back for further findings seems unwarranted. The Act does not expressly require findings. It is one intended to apply to courts not of record as well as those of record, and it requires only that the court be of opinion that ability to defend is not materially affected by military service. We accept the findings as sufficiently evidencing the opinion of the court to that effect.

4. The final question is whether the evidence sufficiently supports the opinion or whether the order constitutes an abuse of discretion.

We think the opinion of the court that Boone's military service did not prevent him from being present and doing whatever could have been done by way of defense finds ample support in the evidence. Boone had been able to get away from Washington to go to New York for the taking of depositions on two separate occasions. He had long notice of the trial date and the court had placed in the files of his Department its order showing the desirability of his presence at that time. Boone, being a lawyer

and presumably knowing the gravity of the accusations against him, might be expected to make some move to get leave to be present. If it were denied, he might be expected to expose every circumstance of his effort to the court in his plea for continuance. Boone's affidavit, after reciting that he was assigned to the International Division, Headquarters, Services of Supply, Washington, D. C., says "The work in said Division is very heavy, and full time and some extra time are required of all officers in said Division, including the defendant. Prior to the declaration of War on Dec. 8, 1941 the work in this Division was very heavy, but since the declaration of War the volume of work has been greatly increased. No leaves whatever have been granted, except in cases of serious emergency."

Most lawyers trained in the equity tradition of trustee fidelity would regard a trial of this kind as a serious emergency. Did he apply for a leave at all? The affidavit pretty clearly implied that he had not. We think the court had ample grounds for the opinion that Boone made no effort to attend to duties that should weigh heavily upon the honor of a lawyer-trustee.

There was likewise support for the opinion that the failure to be represented by counsel did not result from Boone's military service. On February 2, 1942, the court granted his request for a continuance and set the case for trial on May 25, 1942. It was stated to the court that counsel then acting for him was expecting to be called immediately into military service, and it would be necessary for defendant to procure additional counsel. Nevertheless, when the trial date arrived, the fact that this counsel had gone into service on May 13, 1942, was urged as a reason for further postponement. No showing whatever was made as to any effort to obtain other counsel in the long interval allowed by the court for the purpose. This counsel was also stationed at Washington and said he "would not assume to ask for leave at the present time, so soon after having repo.ted for duty."

On the trial date defendant was nevertheless represented in court by local counsel. That counsel however was consulted only three or four days before the trial date and was employed for the sole purpose of making the motion for continuance, and when the court ruled on it he withdrew and declined to proceed further. The defendant's accounts presented to the trial judge showed disbursements since the beginning of the action and before trial

for the following matters, among others, in connection with this case: On August 15, 1941, defendant's deposition was taken at Washington, D. C. This entailed a reporter's fee of $66.00 and a fee of $248.88 paid a Detroit attorney for appearing at the proceeding. On November 3 and 5, 1941, depositions were taken in New York City with the defendant present. These involved a court reporter's fee of $32.25, and fees in the amount of $375.00 for the Detroit attorney and New York counsel obtained to assist him. This item carried a notation that it did not "include services rendered in the taking of depositions in other cases on same date." From August 4, 1941, to January 26, 1942, Deal, the attorney who had represented defendant before withdrawing to accept a commission in Washington, received $218.00 for his services in representing defendant in the case. Two days after judgment, another lawyer from the firm of counsel who had withdrawn after making the motion of May 25 appeared and moved to set the verdict aside and took an appeal, later filing extensive assignments of error. Counsel who had withdrawn from the trial argued the appeal in the Supreme Court of North Carolina.

At all times since the action began defendant has also been represented by counsel from Detroit, Michigan. His inability to appear on the trial date was explained on the ground that he was "definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days." No affidavit from this counsel was produced, and no explanation is made as to how it came that other "cases" were given priority over this in view of the long notice of the trial date and its importance to the client.

In this Court, Boone is represented by his Detroit counsel and by Deal, the lawyer who withdrew from the case to accept a commission in Washington. Besides these, there also appear four other lawyers, none of whom are included in the five who have represented him at previous stages in the case.

In addition to the facts presented to the trial court which we have recited, the trial court apparently considered matters not of record in this case, but of which he took judicial notice. He recites that "the motion to continue is made after the defendant's refusal in one or more instances arising out of litigation respecting the subject matter and personnel involved in this action to appear in the Courts of North Carolina, even on citation for contempt." We

know nothing of these events and disregard this ground of the court's action.

The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. Defendant in spite of his military service in Washington was continuing to administer the fund. The defendant was a member of the bar, and the charges struck at his honor as well as at his judgment. Instead of seeking the first competent forum and the earliest possible day to lay his accounts out for vindication, he sought to escape the forum and postpone the day. He was both present and represented by counsel when depositions were taken which establish his speculation with the trust funds in his personal margin account. We think the record amply supports the conclusion of the trial judge that the claim that military service would prejudice the conduct of his defense, was groundless, and that the absence of himself and all of his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy.

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Affirmed.

Mr. Justice BLACK, dissenting.

The petitioner is a soldier who was on duty in Washington throughout the course of the litigation in North Carolina of this action against him. He duly claimed the protection of the Soldiers' and Sailors' Civil Relief Act of 1940, and rests upon it here. I think he should prevail.

The relevant statutory provision before us may be summarized as follows: Actions brought against a person in military service shall be stayed upon application of that person "unless, in the

opinion of the court, the ability of the . . . defendant to conduct his defense is not materially affected by reason of his military service."

The statutory language has no legislative history and has not previously been interpreted by this Court. The elaborate legislative history set forth by the Court is a history of a clause which was stricken from the 1917 Act, which is not before us now, and which, on its face, has a meaning wholly different from the clause under construction.[1] Hence the problem is a narrow one of analysis of the words of the statute itself.

I believe that the clause under consideration requires that an action against a person in military service must be stayed unless the trial judge concludes (a) that no personal judgment will result and that the action will in effect preserve the interests of all the parties for the duration of the war; or (b) that the defendant is only a formal party; or (c) that the defendant need not be present for any purpose, either before, during, or after the trial, and that he will be adequately represented and has no need to testify or participate in any way; or (d) that the defendant's military service does not preclude him from having ample opportunity to get ready for, and to take his necessary part in the litigation.

In my opinion, none of these conditions are met here. Although the action began as a proceeding to preserve the trust estate, which was quite proper, it terminated with a personal judgment against the petitioner for $11,000 after a trial by jury of many disputed facts. The petitioner was obviously not merely a formal party. One issue in the case was whether he had dissipated trust funds, and for such an inquiry his presence to hear the evidence against him was essential to his interests and his own testimony was, in the words of the trial court, "highly desirable".

[1] The clause for which the Court gives the legislative history is as follows: An action against a person in military service shall be stayed, upon request, "unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought is not materially affected by his military service." This means, in rough substance, what its legislative history says, that the action was to be stayed except where the defendant could readily pay a judgment against himself. But that language was removed and the present provision inserted: the action upon proper request shall be stayed unless in the opinion of the trial judge, "the ability of the defendant to conduct his defense" is affected by military service. The difference between ability to pay a judgment, and ability to conduct a defense is so great that the two clauses have substantially nothing in common. The ability to pay clause has been left in some sections of the Act, as, e. g., §§ 203 206, but it is not before us here.

The sole possible ground for the Court's action, therefore, is that the defendant could have been present and, wilfully taking advantage of the Act, chose instead to absent himself. In reaching this result the Court engages in precisely the speculation which I think the Act prohibits. The Court does not know, and the state court did not try to find out, whether Boone applied for a leave or disclosed its urgency to his superiors; it concludes that he did neither. The Court does not know whether Boone attempted to find new counsel; it assumes that he did not. The Court does not know why Boone chose to participate in certain other law suits against him conducted simultaneously with this one; it assumes that the others were less important than this case. The Court can not know whether the petitioner truly owes the amount of the judgment against him; it must assume that he does because of a proceeding conducted against him in his absence.[2]

The Court emphasizes that Boone is a member of the bar. But for the duration of the war, he is primarily a soldier, with a job to do which Congress intended should overshadow personal interests, whether his, or those of others who seek a personal judgment against him. It is difficult for me to believe that he could adequately have prepared for this trial without a leave of many weeks. The purpose of the Act is to prevent soldiers and sailors from being harassed by civil litigation "in order to enable such persons to devote their entire energy to the defense needs of the Nation." § 100. He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers.

The trial court should, at the very least, have inquired of the appropriate military authorities whether the petitioner could be granted ample leave to prepare his defense and be present for trial. If the Act does not require this, it serves little purpose. It may be argued that this petitioner, a man of knowledge and experience, is as competent to ask his superior officer for leave as is the trial court; but the argument fails because the policy set here, no matter how many qualifications the Court tries to work into it, will shoot far beyond the confines of this case. In

[2] Had this been a judgment by default, Boone might have it set aside upon proper motion made at any time within "ninety days after the termination" of his military service. § 200(4). Whether that section will permit Boone to attack this judgment after the war is a question which the Court expressly reserves.

the course of the war, numerous actions will be brought against soldiers who have never heard of this Act and have no notion that this Court might want them to apply to their superior officers for leave and to make and file a formal record of their superior officers' refusal.

I fear that today's decision seriously limits the benefits Congress intended to provide in the Soldiers' and Sailors' Civil Relief Act. It apparently gives the Act a liberal construction for the benefit of creditors rather than for the benefit of soldiers. It places in trial judges an enormous discretion to determine from a distance whether a person in military service has exercised proper diligence to secure a leave, or whether it is best for the national defense that he make no application at all. These are questions on which the judiciary has no competence, since only the military authorities can know the answers.